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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

KOREAN AIR LINES,

Petitioner

v.

THOMAS V. MACNAMARA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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60 pp

QUESTION PRESENTED

Whether the right provided by Article VIII(1) of the 1957 Treaty of Friendship, Commerce and Navigation between the United States and the Republic of Korea, for companies to "engage . . . executive personnel . . . of their choice," insulates a Korean company from having to justify before an American judge and jury that its selection of a Treaty Trader to serve in an executive capacity was not the result of discrimination on the basis of race, age or national origin.

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THOMAS V. MACNAMARA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Korean Air Lines ("KAL") petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit dated December 21, 1988 (A-1 to A-26)[1] is reported at 863 F.2d 1135. The opinion of the United States District Court for the Eastern District of Pennsylvania entered November 9, 1987 (A-27 to A-46) is unofficially reported at 45 Fair Emp. Prac. (BNA) 384 and 44 Empl. Prac. Dec. (CCH) Para. 37,543.

1. References in the form (A-1 to A-26) refer to pages of the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on December 21, 1988 (A-1). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

TREATY, STATUTES AND REGULATIONS INVOLVED

1. Article VIII(1) of the Treaty of Friendship, Commerce and Navigation, between the United States and the Republic of Korea, 8 U.S.T. 2217, T.I.A.S. No. 3947 (1957) (the "Treaty"), provides in relevant part (8 U.S.T. at 2223):

> Nationals and companies of either Party shall be permitted to engage within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice.

2. Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. § 2000e-(2)(a), provides:

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely

affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

3. Section 4(a) of the Age Discrimination in Employment Act of 1967, as amended (the "ADEA"), 29 U.S.C. § 623(a), provides in relevant part:

> It shall be unlawful for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this Act.

4. Section 101(a)(15)(E)(i) of the Immigration and Nationality Act of 1952, as amended (the "INA"), 8 U.S.C. § 1101(a)(15)(E), provides in relevant part:

> [A]n alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national . . . (i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national . . . .

5. 22 C.F.R. § 41.40(a) (1980) provides in relevant part:

> (a) An alien shall be classifiable as a nonimmigrant treaty trader if he establishes to the satisfaction of the consular officer that he qualifies under the provisions of section 101(a)(15)(E)(i) of the Act and that: (1) He intends to depart from the United States upon termination of his status; and (2) if he is employed by a foreign person or organization having the nationality of the treaty country which is engaged in substantial trade as contemplated by section 101(a)(15)(E)(i), he will be engaged in duties of a supervisory or executive character, or, if he is or will be employed in a minor capacity, he has the specific qualifications that will make his services essential to the efficient operation of the employer's enterprise and will not be employed solely in an unskilled manual capacity.

STATEMENT OF THE CASE

Petitioner Korean Air Lines ("KAL") is a Korean Corporation which operates branch offices in the United States. Thomas MacNamara, plaintiff below, was employed by KAL as district sales manager and was in charge of KAL's operations in Pennsylvania, Delaware and Southern New Jersey. In the spring of 1982, KAL reorganized its United States operations. As part of this reorganization, MacNamara was terminated from employment. His job duties were assumed by Wan Gin Chung.

Chung had previously been in charge of KAL's Washington, D.C. district office. Chung is a Korean citizen who entered the United States to work for KAL pursuant to an E-1 "Treaty Trader" visa. *See* 8 U.S.C. § 1101(a)(15)(E) and 22 C.F.R. § 41.40(a) (1980). Following KAL's reorganization, Chung served as its district sales manager for a territory extending from Pennsylvania to Florida.

MacNamara filed suit claiming that his discharge violated Title VII, the ADEA and ERISA. The District Court's jurisdiction was invoked pursuant to 28 U.S.C. § 1331. Alleging that "all of defendant's American Sales Managers in the United States were replaced by Koreans," MacNamara complained that KAL had discriminated against him on the basis of race, national origin and age.

KAL moved to dismiss the complaint under Rule 12(b)(6) on the basis of Article VIII(1) of the Treaty of Friendship, Commerce and Navigation between the United States and the Republic of Korea. 8 U.S.T. 2217, 2223 T.I.A.S. No. 3947 (1957). Following limited discovery on the nature of MacNamara's duties and those of his successor and KAL's corporate status and organization, the District Court considered KAL's motion as one for summary judgment pursuant to Rule 56.

In its opinion entered November 9, 1987, the District Court granted summary judgment in favor of KAL, holding that the Treaty gives a Korean corporation protection to make its employment decisions in limited areas without regard to domestic employment laws (A-28). According to the District Court, this right comes into play only when the Korean corporation selects one of its home country nationals for a position covered by Article VIII(1) of the Treaty (A-41).

On appeal, the Third Circuit reversed. Although agreeing with the District Court that the Treaty assures "foreign corporations that they may have their business in the host country managed by their own nationals if they so desire," (A-8, 9), the Court of Appeals held that this right is not inconsistent with a proscription against intentional discrimination on the basis of race, national origin or age. Judge Higginbotham did not agree that Article VIII(1) permits courts to look behind a company's decision to hire an executive of its own nationality to scrutinize the company's subjective motivations (A-17 n.9).

The Third Circuit recognized that the disparate impact theory of liability, when applied to corporations hailing from countries whose populations are largely homogeneous, could result in liability where the employer did nothing more than exercise its right under the Treaty. For this reason the Court concluded that liability for disparate impact could not be reconciled with the Treaty and may not be imposed (A-25). The Court nevertheless condoned the use of statistical proof to establish a case of intentional discrimination (A-25). The Third Circuit remanded the case for further proceedings consistent with its opinion.

REASONS FOR GRANTING THE PETITION

Four Courts of Appeals have ruled on the relationship between the Friendship, Commerce and Navigation (FCN) treaties and the anti-discrimination laws. All four have reached different results and have utilized differing approaches than each other. This conflict among the circuits presents a particularly compelling case for this Court to resolve because of the necessity for the United States to speak as "one people, one nation, one power" in its relations with foreign nations. *Zschering v. Miller,* 389 U.S. 429, 442 (1968) (Stewart, J., concurring), *quoting Chinese Exclusion Case,* 130 U.S. 581, 606 (1889).

In *Spiess v. C. Itoh & Co. (America),* 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds,* 457 U.S. 1128 (1982), the Fifth Circuit considered Article VIII(1) of the FCN Treaty with Japan which is identical in wording to the Treaty provision at issue in this case. The Court ruled that the Treaty fully insulated the company from domestic anti-discrimination laws with respect to the hiring of executives.

The Second Circuit reached the opposite conclusion in *Avagliano v. Sumitomo Shoji America, Inc.,* 638 F.2d 552 (2d Cir. 1981), *vacated on other grounds,* 457 U.S. 176 (1982). Applying the same treaty provision, the Court held that the Treaty was intended to facilitate a company's employment of its own nationals, primarily by exempting it from local laws restricting the employment of noncitizens. The Second Circuit attempted to harmonize the Treaty with domestic law by inventing an expanded "bona fide occupational qualification" (BFOQ) defense. In the court's view, the foreign company could escape liability only by showing that employment of its home country nationals was reasonably necessary to the successful operation of its business in the United States.

This Court granted certiorari in *Sumitomo* to decide whether Article VIII(1) of the Japanese FCN Treaty provides a defense to a Title VII employment discrimination

suit against an American subsidiary of a Japanese company. 457 U.S. 176 (1982). Holding that a domestically incorporated subsidiary could not invoke rights under Article VIII(1), the Court did not have to reach the issue of the relationship between the Treaty and the anti-discrimination laws. The question left undecided by this Court's *Sumitomo* decision continues to divide the appellate courts.

The Sixth Circuit adopted another interpretation of the relationship between the FCN Treaties and domestic employment legislation in *Wickes v. Olympic Airways,* 745 F.2d 363 (6th Cir. 1984). Applying the somewhat different wording of Article XII(4) of the Greek FCN Treaty, the court held that the Treaty provided Greek companies only a narrow privilege to give preference to Greek citizens in the hiring of essential personnel.

Here, the Third Circuit correctly held that the Treaty Trader who replaced MacNamara was an "executive" within the meaning of Article VIII(1) and that the right "to engage" foreign nationals necessarily includes the right to replace people in MacNamara's position with a foreign national. (A-11, 12). The court then proceeded to water-down this right by holding that KAL must justify its selection decisions on a case-by-case basis before American judges and juries. In so doing, the Third Circuit rejected the literal language approach adopted by the district court here (A-36), the Fifth Circuit in *Speiss,* 643 F.2d 361, and relied upon by this Court in *Sumitomo,* 457 U.S. at 189.

At the same time, the Third Circuit recognized that its decision would create an economic burden on foreign businesses by requiring them to defend in court the motivation behind their personnel decisions. (A-22). The court also acknowledged that its decision would create real concern in the minds of foreign businesses about the likelihood of confusion or prejudice by local factfinders. (A-23). This

economic burden and concern will have the effect of discouraging foreign businesses from exercising their Treaty rights.

The Third Circuit's decision means that foreign businesses will have to comply with the requirements of local law in their selection of executives to manage their American branch operations. It will thus encourage foreign countries to apply their domestic laws to American companies in the selection of the executives to run branches overseas. The effect will be to limit the discretion of companies to select the executives in whom they have the most confidence, precisely the evil the Treaty provision was designed to eradicate. Ultimately, the Third Circuit's decision will discourage foreign investment into the United States and American investment abroad, contrary to the intent of the Treaty. Resolution of the conflict among the circuits is essential to clarify the rights of investors in both countries to manage and control their overseas branch operations with key executives in whom they have the most confidence.

Moreover, an important issue of federal law arises from the conflict between the views of the United States and the Republic of Korea over the meaning and interpretation of the Treaty rights that they have created. While the United States government attempts to harmonize the Treaty with domestic employment discrimination laws, the Korean Ministry of Foreign Affairs views Article VIII(1) as a special law which takes precedence over its own and the United States' prior domestic and general laws. The Ministry of Foreign Affairs has expressed its opinion that the phrase "of their choice" in Article VIII(1) must be interpreted to entitle the foreign employer to decision making or free choice in regard to hiring or engagement in the host country. (A-35). The Third Circuit's decision in effect negates the "of their choice" language. If allowed to stand, it will place the United States in conflict with one of our allies and major trading partners.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1741

THOMAS V. MacNAMARA

Appellant

v.

KOREAN AIR LINES

Appellee

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(Civil Action No. 82-5085)

Argued May 6, 1988

BEFORE: HIGGINBOTHAM, STAPLETON, and GREENBERG, *Circuit Judges*

(Opinion Filed December 21, 1988)

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OPINION OF THE COURT

STAPLETON, *Circuit Judge.*

In this appeal we must determine the relationship between the employer choice provisions contained in the Treaty of Friendship, Commerce and Navigation, November 28, 1956, United States-Korea, 8 U.S.T. 2217, T.I.A.S. No. 3947 ("Korean FCN Treaty"), and the proscriptive employer choice language of subsequently enacted federal civil rights legislation, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII") and the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* ("ADEA"). We find ourselves in disagreement with the analysis of the district court and will reverse and remand for further proceedings.

Appellant Thomas MacNamara, an American citizen, began working for the appellee Korean Airlines ("KAL") in

1974, after having previously worked for several other airlines. In December, 1977, he was promoted from salesman to district sales manager for Delaware, Pennsylvania and southern New Jersey. On June 15, 1982, MacNamara, then fifty-seven years of age, was dismissed, ostensibly as part of KAL's reorganization of its United States operations. KAL discharged six American managers nationally, including MacNamara, and replaced them with four Korean citizens. The Korean citizen who replaced MacNamara was a forty-two year old man who previously had been in charge of KAL's Washington office. After exhausting his administrative remedies, MacNamara filed suit against KAL in November, 1982, alleging that his discharge violated Title VII, the ADEA and the Employment Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.* ("ERISA"). He complained specifically that KAL had discriminated against him on the basis of race, national origin and age, and additionally that he was entitled to recover because "all of Defendant's American Sales Managers in the United States were replaced by Koreans."

In January, 1983, KAL filed a motion to dismiss MacNamara's complaint on the ground that its conduct was privileged under the terms of the Korean FCN Treaty. The Korean FCN Treaty is one of a series of Friendship, Commerce and Navigation Treaties the United States signed with various countries after World War II. Although initially negotiated primarily for the purpose of encouraging American investment abroad, the Treaties secured reciprocal rights and thus granted protection to foreign businesses operating in the United States. *See generally* Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice* 5 Am. J. Comp. L. 229 (1956). The specific provision of the Korean FCN Treaty relied upon by KAL in this case, provides as follows:

> 1. Nationals and companies of either Party shall be permitted to engage, within the territories of the

> other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of a profession within the territories of such other Party, for the particular purpose of making examinations, audits and technical investigations for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.

8 U.S.T. at 2223. KAL argued to the district court that the "of their choice" language in the first sentence of Article VIII(1) gave it the right to employ executives of its own choosing, unhampered by domestic anti-discrimination employment statutes.

In response to KAL's motion, MacNamara, joined by the United States as amicus, claimed that Article VIII(1) secured to a foreign business only the right to select managerial and technical personnel on the basis of citizenship and did not provide a broad exemption from laws such as Title VII and the ADEA which prohibit employment decisions on the basis of race, national original, or age.

The district court granted KAL's motion, reasoning that the signatory countries, especially the United States, intended that the Treaty assure foreign corporations of their ability to manage investments in the host country without interference. Consistent with the Treaty's general intent, Article VIII(1)'s unconditional language was drafted specifically to exempt a foreign company's choice as to essential personnel from the operation of domestic employment laws. As a result, the court concluded that Title VII and the ADEA could not be reconciled with Article VIII(1), and in the face of such conflict, the terms of the Treaty controlled.

The court, however, limited its holding to employment decisions regarding essential personnel, and to situations involving the favoring of Korean citizens; thus KAL employment decisions not having the effect of favoring Korean citizens would be subject to the ADEA and Title VII.

The district court's decision is consistent with the opinion of the Fifth Circuit Court of Appeals in *Spiess v. C. Stoh & Co. (America)*, 643 F.2d 353 (5th Cir. 1981) *vacated on other grounds*, 457 U.S. 1128 (1982), which considered the scope of the Japanese FCN Treaty. In Spiess, American employees of C. Stoh & Company (America) brought a class action against their employer alleging that promotions and benefits were made available to Japanese citizens alone, in violation of federal law. C. Stoh & Company (America), a New York corporation wholly owned by a Japanese Corporation, invoked the protection of Article VIII(1) of the Japanese FCN Treaty, which is identical in relevant part to the Korean FCN Treaty, and moved for dismissal. The district court held that C. Stoh & Company (America) was a United States company for purposes of the Treaty, and thus could not assert the Article VIII(1) rights of Japanese corporations operating in this country. The Court of Appeals reversed, reasoning that the Treaty not only covered the actions of the foreign subsidiary, but provided it with a complete defense as well. The absolute language of Article VIII(1), the court held, fully insulated the company from domestic anti-discrimination laws with respect to the hiring of executives.

The Fifth Circuit Court of Appeals, however, is only one of three federal appellate courts that has considered the issue. Several months before Spiess, the Second Circuit Court of Appeals decided *Avigliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2nd Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982). *Sumitomo* involved a class action against a wholly-owned subsidiary of a Japanese corporation brought by secretaries who alleged that the corporation had a discriminatory policy of filling its management level positions exclusively with male Japanese

nationals. The court first concluded, like *Spiess,* that the subsidiary could invoke the Japanese FCN Treaty in defense. Nevertheless, in contrast to *Spiess,* the court additionally held that the Treaty did not give the company a broad license to violate American anti-discrimination laws. Rather, the court reasoned, Article VIII(1) was primarily intended to exempt foreign companies from local legislation restricting the employment of noncitizens, and more generally, to facilitate a company's employment of its own nationals. In light of that purpose, the court suggested that the Treaty and Title VII could be reconciled by reference to Title VII's "bona fide occupational qualification" ("BFOQ") exception.[1] Although ordinarily the BFOQ exception is narrowly construed, the Second Circuit Court of Appeals reasoned that interpreting it more broadly in the context of FCN Treaties was warranted by the terms of Article VIII(1) and would give foreign employers reasonable latitude to hire solely nationals for its management positions. In the court's view, a foreign employer exercising its right under Article VIII(1) is sufficiently protected by allowing it to escape liability when it can demonstrate that the employment of its citizens was "reasonably necessary to the successful operation of its business" in the United States. 638 F.2d at 559. With respect to the facts in *Sumitomo,* this meant that the employment decision would have to be justified on the basis of

> the unique requirements of a Japanese company doing business in the United States, including such factors as

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1. Title VII provides in pertinent part:

> [i]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .

42 U.S.C. § 2000e-2(e).

> a person's (1) Japanese linguistic and cultural skills, (2) knowledge of Japanese products, markets, customs, and business practices, (3) familiarity with the personnel and workings of the principal or parent enterprise in Japan, and (4) acceptability to those persons with whom the company or branch does business.'

Id.

The Supreme Court granted *certiorari* in *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176 (1982), and vacated the judgment on the ground that the wholly-owned subsidiary was not a company of Japan so as to come within the coverage of the FCN Treaty. Although the Court expressly declined to interpret the scope of Article VIII(1) of the Japanese FCN Treaty, it nevertheless declared:

> The purpose of the Treaties was not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage.

Id. at 187-188.

The Sixth Circuit Court of Appeals, in *Wickes v. Olympic Airways,* 745 F.2d 363 (6th Cir. 1984), decided after the Supreme Court's *Sumitomo* opinion, articulated yet another view of the relationship between anti-discrimination laws and FCN Treaties. Wickes claimed that Olympic Airways, a foreign corporation owned by the government of Greece, fired him on the basis of age and national origin in violation of Michigan's anti-discrimination law.[2] Olympic Airways invoked Article XII(4) of the Greek FCN Treaty, arguing that it provided complete immunity from the state

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2. Wickes did not properly exhaust his administrative remedies and therefore was barred from bringing analogous federal claims under Title VII and the ADEA.

anti-discrimination law.[3] The court rejected Olympic Airways broad position, reasoning that the Treaty offered only a narrow privilege to give preference to Greek citizens in the hiring of essential personnel. Because the express terms of Michigan's anti-discrimination law did not proscribe employment decisions on the basis of citizenship, the court concluded that the Treaty and the state legislation were not in conflict. The court further recognized, however, that "[t]o the extent that plaintiff may claim on remand that Greek citizenship and national origin are synonymous and that Michigan law prevents Olympic from giving preference to Greek citizens in management and technical positions, such a claim would conflict with the Treaty and the Treaty would prevail." *Id.* at 368.

Because we agree with KAL that MacNamara's replacement was an "executive" within the meaning of Article VIII(1) and that the right "to engage" foreign nationals necessarily includes the right to replace people in MacNamara's position with a foreign national (Section II,

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3. The language of Article XII of the Greek FCN Treaty differs from the language of Article VIII(1) of the Korean FCN Treaty. Article XII(4) provides in pertinent part:

> Nationals and companies of either Party shall be permitted to engage within the territories of the other Party . . . executive personnel . . . and other employees *of their choice* among those legally in the country and eligible to work. Moreover, such nationals and companies shall be permitted to engage, on a temporary basis, accountants, and other technical experts, *regardless of nationality* and regardless of the extent to which they possess the qualifications required by applicable laws for the exercise of their duties within the territories of such other Party, for the particular purpose of making examinations, audits and technical investigations for the exclusive account of their employers in connection with the planning and operation of enterprises controlled by the latter or in which they have a financial interest within such territories.

Treaty of Friendship, Commerce and Navigation, Aug. 3 & Dec. 26, 1951, United States-Greece, 5 U.S.T. 1829, T.I.A.S. No. 3057 (as cited in *Wickes*, 745 F.2d at 367) (emphasis added).

infra), we must wrestle with the broader issues discussed in *Spiess, Sumitomo, and Wickes.*

We agree with the Courts of Appeals for the Fifth and Sixth Circuits that Article VIII(1) goes beyond securing the right to be treated the same as domestic companies and that its purpose, in part, is to assure foreign corporations that they may have their business in the host country managed by their own nationals if they so desire. We also agree with the conclusion of the Sixth Circuit Court of Appeals that Article VIII(1) was not intended to provide foreign businesses with shelter from any law applicable to personnel decisions other than those that would logically or pragmatically conflict with the right to select one's own nationals as managers *because of their citizenship.* Insofar as Title VII and the ADEA proscribe intentional discrimination on the basis of race, national origin, and age, we perceive no theoretical or practical conflict between them and the right conferred by Article VIII(1). Thus, for example, we believe that a foreign business may not deliberately undertake to reduce the age of its workforce by replacing older Americans with younger foreign nationals. (Section III *infra.*)

On the other hand, to the extent Title VII and the ADEA proscribe personnel decisions based on citizenship solely because of their disparate impact on older managers, a particular racial group, or persons whose ancestors are not from the foreign country involved, we perceive a potential conflict and conclude that it must be resolved in favor of Article VIII(1). (Section IV, *infra.*)

II.

We first address MacNamara's contention that his discharge does not trigger the protection of Article VIII(1). More specifically, MacNamara argues first that KAL's Treaty right to *"engage"* executives of its choice does not subsume or incorporate its decision to *terminate* him, and second that he was not an "executive" within the meaning

of the Treaty. The district court held against MacNamara on these issues, reasoning that the concept of engagement necessarily included termination, and also concluding, after reviewing MacNamara's job responsibilities, that he performed as an executive. Like the district court, we reject MacNamara's arguments although on somewhat different grounds.

MacNamara fails to appreciate that the employment decision at issue is not simply that of his termination, but additionally involves KAL's act of replacing him with a Korean national. The appropriate focus, therefore, is whether KAL's decision to let MacNamara go *and* reassign his duties to a Korean national is the kind of decision to which Article VIII(1) applies. More importantly, because KAL's defense is that Article VIII(1) protects its selection of the Korean national, the relevant inquiry involves whether MacNamara's *replacement* was both "engaged" by KAL and served as an "executive" under the terms of the Treaty. From that proper perspective, MacNamara's arguments are not persuasive.

First, MacNamara suggests that we adopt as the appropriate definition of "engage", "to obtain or contract for the services of: employ." *Webster's II New Riverside University Dictionary,* 433 (1984). Even if we accept *arguendo* such a narrow meaning of engage, KAL certainly obtained the services of MacNamara's replacement, Mr. Wan Gin Chung. Therefore, KAL's decision to transfer MacNamara's job responsibilities to a Korean national plainly involved engaging an employee of its choice. MacNamara further insists, however, that "even if KAL has the right to hire whomever it chooses as 'executives,' it does not have the right to fire with impunity once it has made a selection. Thus, MacNamara contends that Article VIII(1) does not protect any personnel decision involving engaging a foreign national as an executive if its effect is to terminate the employment of another. We conclude, however, that the right of a foreign business under Article VIII(1) to engage the services

of its own citizens as executives was intended to include the right to engage them as replacements for existing personnel. A contrary reading of Article VIII(1) would tend to freeze a foreign business' initial management structure and discourage any experimentation with host country executive personnel. We are confident that the drafters of the Treaty did not intend such a result.

We also reject MacNamara's contentions that his status as an executive is the appropriate inquiry and that there is a material dispute of fact on that issue. The right secured by Article VIII(1) is the right to engage executive personnel of one's choice and we believe the relevant inquiry is whether MacNamara's responsibilities were reassigned to an "executive" within the meaning of that Article. MacNamara's responsibilities were reassigned to Mr. Wan Gin Chung. It is undisputed that Mr. Chung entered and remained in the United States pursuant to an E-1 "treaty trader" visa which is granted exclusively to foreign employees who perform duties of a supervisory or executive character,[4] and that Mr.

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4. The Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1101, *et seq.* ("INA"), authorizing treaty trader entry, provides in pertinent part:

> an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him: (i) solely to carry on substantial trade, principally between the United Sates and foreign state of which he is a national; or (ii) solely to develop and direct the operations of an enterprise in which he is invested, or of an enterprise of which he is actively in the process of investing, a substantial amount of capital.

8 U.S.C. § 1101(a)(15)(E). More specifically, according to the regulations of the State Department, which is responsible for implementing the INA:

> An alien shall be classifiable as a nonimmigrant treaty trader if he establishes to the satisfaction of the consular officer that he qualifies under the provisions of section 101(a)(15)(E)(i) of the Act and that: (1)

(footnote continued on next page)

Chung, following the reorganization, served as sales manager for a region extending from Pennsylvania to Florida. We agree with the district court that the treaty trader provisions of the Immigration and Nationality Act were enacted to complement the FCN Treaties and that the government's decision granting entry to Mr. Chung as an E-1 treaty trader is strong evidence of his "executive personnel" status. Given that decision and the other uncontradicted evidence regarding Mr. Chung's responsibilities,[5] we conclude that the record establishes him as an executive for purposes of Article VIII(1).

MacNamara argues, however, that even if Mr. Chung is considered an "executive" he is so by virtue of responsibilities other than, or in addition to, the ones received from MacNamara because MacNamara's job did not entail "executive" duties. We conclude, however, that the suggested approach of fragmenting the responsibilities of a "chosen" executive and second-guessing whether they are sufficiently "executive" is inappropriate. The focus must be on the overall responsibility of the "chosen" executive. In a situation of this kind, if a foreign business decides that the responsibilities of the individual replaced are such that they

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(footnote continued from preceding page)

He intends to depart from the United States upon the termination of his status; and (2) if he is employed by a foreign person or organization having the nationality of the treaty country which is engaged in substantial trade as contemplated by section 101(a)(15)(E)(i), *he will be engaged in duties of a supervisory or executive character,* or, if he is or will be employed in a minor capacity, he has special qualifications that will make his services essential to the efficient operation of the employer's enterprise and will not be employed solely in an unskilled manual capacity.

22 C.F.R. § 41.40(a)(1987) (emphasis added).

5. MacNamara complains about not having received responses to outstanding discovery prior to his being required to respond to the motion for summary judgment, but none of this discovery was directed to the responsibilities of Mr. Chung.

require the attention of a foreign national "executive," that is sufficient.[6]

In sum, we find that the reassigning of MacNamara's job responsibilities to Mr. Chung involved KAL's engaging an executive of its choice within the meaning of Article VIII(1), and as such we now turn to the substantially more complex issues presented in this case.

III.

Because previous treaties failed to protect businesses from discriminatory treatment in foreign markets, and consequently inhibited investment abroad, the general content of the modern FCN Treaties was guided by the principle of equality of treatment. Herman Walker, a primary architect of the FCN Treaties, explained:

> Treaties for investment purposes deal with the basic legal conditions which influence the degree to which potential investors are willing to venture their capital in undertakings in a foreign land. They aim, on a joint consensual basis, to establish or confirm in the potential host country a governmental policy of equity and hospitality to the foreign investor. This means, above all, assurance that the enterprise and property of the alien will be respected and that he will be accorded equal protection of the laws alike with citizens of the country. This fundamental idea, then, is the raw material from which the variegated content of the treaties is elaborated.

Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice,* 5 Am. J.

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6. Mr. Chung was eventually replaced by Mr. Hong, another Korean citizen and E-1 treaty trader, and the district court's opinion focused on the status of Mr. Hong rather than that of Mr. Chung. While our analysis differs, the record demonstrates that both were executive personnel.

Comp. L. 229, 230 (1956).[7] As derived from that equality principle, the standard of "national treatment" primarily determined the functional rights accorded foreign businesses under the FCN Treaties. Walker explained:

> Moreover, the basic rule to govern the conduct of such activities has long since been settled, in United States treaty practice, as "national treatment": that is, equality of treatment as between the alien and the citizen of the country. The former thus is entitled freely to carry on his chosen business under conditions of non-discrimination, and to enjoy the same legal opportunity to succeed and prosper on his merits as is allowed citizens of the country.

Id. at 232.

Although national treatment was the predominant standard, two other kinds of protection were established in FCN Treaties. When the signatory nations were unwilling to grant national treatment with respect to some issues, the Treaty afforded a lesser standard of protection, "most-favored-nation treatment," or treatment no less favorable than that under which the most privileged foreign company operated. *Sumitomo,* 457 U.S. at 188 n. 18. Alternatively, the Treaty also provided for absolute or non-contingent standards that gave foreign employers a certain specified protection without regard to whether the same protection was provided to host country businesses. *Id.*

With the foregoing understanding of the structure and purpose of FCN Treaties in general, we now examine Article VIII(1) of the Korean FCN Treaty in particular. We note initially that our role in treaty interpretation is limited to ascertaining and enforcing the intent of the treaty parties.

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7. Walker served as Advisor on Commercial Treaties at the State Department and according to them was responsible for formulating the general structure of the postwar FCN Treaties, *Sumitomo,* 456 U.S. at 181 n.6 (citing Department of State Airgram A-105, dated Jan. 9. 1976).

Sumitomo, 457 U.S. at 185. The literal meaning of a treaty's language should control unless "application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories." *Id. at 180 (quoting Maximov v. United States,* 373 U.S. 49, 54 (1963)).

Article VIII(1) of the Korean FCN Treaty on its face is absolute and ostensibly self-defining. Neither KAL nor MacNamara, however, suggest that a literal interpretation of the provision is an appropriate one. Both parties agree, for example, that the right to "executive personnel . . . of their choice" does not entitle a foreign company operating in the United States to select among American citizens on the basis of their age, race, sex, religion or national origin, although Article VIII(1) on its face would permit such discrimination. Because the signatories had no reason to bargain for the right to discriminate within the host country's labor pool, a literal interpretation can not be reconciled with the Treaty's intent and negotiating history.

The parties also agree that Article VIII(1) goes beyond assuring national treatment.[8] Whatever the rules governing the selection of executive personnel by host country companies, foreign businesses are granted the right to engage "executive personnel . . . of their choice." Moreover, the parties further agree that this right includes the right to discriminate on the basis of citizenship; thus foreign businesses clearly have the right to choose citizens of their own nation as executives *because they are such citizens.* The parties part company, however, on whether this right to discriminate on

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8. Courts have consistently reached this conclusion based on both the absolute character of the language used in Article VIII(1) as contrasted with other portions of the Treaty and the legislative history demonstrating that the provision was intended to protect foreign businesses from "percentile laws." *See e.g., Wickes,* 745 F.2d at 367; *Spiess* 643 F.2d at 360. A construction of Article VIII(1) that would limit its effect to national treatment would not provide such protection. *See discussion, infra* at 21.

grounds of citizenship is the full extent of the protection conferred by Article VIII(1).

MacNamara contends that the only right granted by Article VIII(1) is the right to choose one's own citizens *because of their citizenship.* As a result, according to MacNamara, Article VIII(1) does not confer the right to choose one's own citizen over a citizen of the host country because of race, sex, or age. KAL, on the other hand, reads Article VIII(1) to confirm more than the right to choose one's own citizens *because of their citizenship;* it finds in the provision an immunity from Title VII and the ADEA for any decision on executive personnel that favors a citizen of one's own nation. Thus, KAL argues in effect that it has the right under Article VIII(1) to choose a citizen of Korea for an executive position *for any reason* and a concomitant right to be free from judicial scrutiny of its subjective motivation in choosing the Korean citizen. Accordingly, KAL urges us to hold, as did the district court, that a decision by a foreign business to engage an executive from its own country cannot be the subject of a Title VII or ADEA suit.

While we find some merit in KAL's position, we conclude that it paints with far too broad a brush. The target of Article VIII(1) was legislation that forced foreign employers to hire host country personnel. Because its objective was thus limited, the text and the relevant history indicate that the negotiators understood that employment decisions regarding the personnel described in Article VIII(1) would be free of domestic laws utilizing citizenship as a criterion, but would be subject generally to other legally imposed criteria. Since Article VIII(1) can be construed in a manner which is both supported by its text and history and consistent with Title VII's and the ADEA's proscriptions of intentional race, national origin, and age discrimination, we cannot accept KAL's position. *See e.g., Whitney v. Robertson,* 124

U.S. 190 (1888) (courts must try to reconcile competing legislation so as to effectuate the purposes of both while not sacrificing the terms of either).[9]

Our review of the history of the negotiations leading up to the FCN Treaties[10] has led us to the same conclusion as that of the Wickes court:

> The post-World War II Friendship, Commerce and Navigation treaties were negotiated in a period characterized by so-called "percentile" restrictions which required American companies operating abroad to hire a certain percentage of citizens of the host country. These restrictions were thought to have the effect of inhibiting American companies operating abroad from hiring the people in whom they had the greatest confidence. . . . The legislative history of the post-war treaties suggests that both parties deemed the right to utilize the services of their own nationals in managerial, technical, and confidential capacities to be critical.

745 F.2d at 367-368 n. 1 (citations omitted). In short, this history persuasively demonstrates that the target of Article VIII(1) was domestic legislation that discriminated on the basis of citizenship and that the provision was necessary for

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9. Judge Higginbotham does not agree that Article VIII(1) permits courts to look behind a company's decision to hire an executive of its own nationality to scrutinize the company's subjective motivations.

10. *See,* in particular, Foreign Service Despatch No. 144 from the U.S. Embassy, The Hague, to Dept. of State, Aug. 16, 1954 ("...the big problem to which [Article VIII(1)] was addressed was so-called percentile legislation..."); Foreign Service Despatch No. 914 from the U.S. Embassy, Brussels, to Dept. of State, Mar. 11, 1955 ("... the abuse [Article VIII(1)] was designed to correct, namely "percentile" laws,..."): Foreign Service Despatch No. 2075 from the U.S. Embassy, Paris, to Dept. of State, May 7, 1959 (U.S. negotiators worried about French percentile laws).

the limited purpose of securing to foreign investors the freedom to place their own citizens in key management positions, thus facilitating their operational success in the host country.

By contrast, the history of these negotiations is barren of any suggestion that Article VIII(1) was intended to achieve anything other than the right to utilize ones own citizens in the capacities specified and KAL has offered no persuasive reason why the parties would have been motivated in the 1950's to negotiate for an exemption from laws prohibiting race, national origin, or age discrimination. To the contrary, the text of the Article itself reflects an understanding on the part of the negotiators that personnel decisions would remain subject to domestic legislation not inconsistent with the right to discriminate in favor of one's own citizens. The second sentence of Article VIII(1) guarantees to foreign businesses the right to engage their own people as accountants and other technical experts regardless of the extent to which they may have satisfied the professional qualifications required under domestic law.[11] If the first sentence had been intended to give a foreign employer the right to engage a citizen of its own country without regard to domestic laws that would otherwise impinge on that decision, the second sentence would have been unnecessary. Its presence suggests that the negotiators intended a foreign employer's decision to be unaffected by laws that discriminated on the basis of citizenship but nevertheless be subject to other domestic laws, excepting only those specifying professional qualifications.

The district court and KAL reason that, had the signatories intended to subject key employment decisions to antidiscrimination legislation, Article VIII(1)'s unconditional language could have been qualified by a clause as adopted

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11. The second sentence, like the first, is not literally limited to decisions involving citizens of the foreign employer's country. As we have noted, however, neither side argues that Article VIII(1) was intended to govern decisions that do not involve such citizens.

subsequently in the Pakistanian FCN Treaty: "[n]ationals and companies of either party shall be permitted, *in accordance with the applicable laws,* to engage, within the territories of the other party . . . executive personnel . . . of their choice." Treaty of Friendship and Commerce, Nov. 12, 1959, United States-Pakistan, Art. VIII. 12 U.S.T. 110-114, T.I.A.S. 4683 (emphasis added). Moreover, the district court noted that the United States expressly rejected a Uruguayan proposal to modify the "of their choice" language with the clause. ". . . discrimination against nationals of the other party shall be avoided, and without prejudice to laws designed to protect their employment." Dept. of State Airgram No. 385 from U.S. Embassy, Montevideo, to the Dept. of State, Nov. 8, 1949.

We find the reasoning of the district court and KAL unpersuasive. As explained by the United States negotiators, "local laws" clauses such as contained in the Pakistanian FCN Treaty and as deleted in the Uruguayan FCN Treaty were to be avoided because they would enable countries to pass exactly the kind of legislation that United States investors feared — laws limiting the employment of United States' citizens or requiring the employment of locals. Such domestic laws, although ostensibly applicable to local and foreign companies alike, would impact the operation of the foreign company specially. Foreign companies alone would be deprived access to the services of their own nationals in whom presumably they had the greatest confidence.[12]

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12. *See e.g.,* Foreign Service Despatch No. 914 from the U.S. Embassy, Brussels, to Dept. of State, Mar. 11, 1955 ("The Belgians then proposed to clarify the wording [of Article VIII(1)] by inserting a local laws clause; but the U.S. side replied that such a broad exception would leave the way open for precisely the abuse the sentence was designed to correct, namely, 'percentile' laws and other governmental flats circumscribing freedom of choice of high-grade personnel on a purely nationality basis.").

Thus, the negotiation histories as a whole clearly reveal that, as far as American negotiators were concerned, in order to assure American investors of the right to hire qualified Americans in executive positions, and thus to overcome local legislation precluding that right. Article VIII(1) had to be drafted in absolute terms. Yet, that absolute language was intended to confer no greater right than an employer's freedom to choose the nationality of its executive labor pool.

We believe it was these considerations that prompted the Supreme Court's observation in *Sumitomo* that the purpose of the Treaty was not to give foreign corporations greater rights than domestic corporations but rather to free them from "discrimination based on their alienage." 457 U.S. at 187-188. This observation is consistent with MacNamara's position, but not with that of KAL. If Article VIII(1) is read as protecting a foreign corporation's right to employ its own citizens, it is thereby guaranteed the same access to its own citizens as domestic employers have to theirs. If it is interpreted to confer an immunity from Title VII and the ADEA in connection with personnel decisions involving citizens of the foreign company's country, it would give to foreign businesses a right not possessed by domestic employers.

Finally, we note that our reading of Article VIII(1) is consistent with that of the State Department which is the agency that enforces the FCN Treaty. The Supreme Court declared in *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961), that "[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight." In its amicus brief, the State Department interprets Article VIII(1) as merely "creat[ing] a limited privilege to hire noncitizens, not a broad exemption from laws that prohibit discrimination on grounds unrelated to citizenship." Accordingly, the government urges this court to reverse the judgment of the district court insofar as

it held that KAL had the "right to fire MacNamara and replace him with a Korean treaty trader, even if that decision was based on race, national origin, or age." Because the available Treaty history supports the State Department's position, we accord appropriate weight to that interpretation.[13]

Our conclusion that Article VIII(1) was intended to do no more than entitle a foreign business to favor personnel and prospective personnel on the basis of citizenship does not end the matter, however. KAL's most plausible argument is that even if the intent of Article VIII(1) is so limited, the operation of Title VII and the ADEA nevertheless cannot be reconciled with the Treaty right. Before addressing this contention, we note our agreement with KAL that in the absence of evidence suggesting Congress intended subsequent legislation to effect existing treaty rights, and in the event the enactments conflict, the Treaty must prevail. *See, e.g., McCulloch v. Sociedat Nacional de Marineros de Honduras,* 372 U.S. 10, 21-22 (1963): *Spiess*, 643 F.2d at 356. Moreover, we agree with KAL that there is no evidence that Congress intended to abrogate the Article VIII(1) right in any way when it enacted Title VII and the ADEA. We perceive considerably less conflict, however, than does KAL.

There is no logical conflict between Article VIII(1), as we have interpreted it, and Title VII or the ADEA insofar as the latter proscribe intentional discrimination on the basis of race, national origin, and age. Contrary to the apparent assumption of the Second Circuit Court of Appeals in *Sumitomo,* national origin discrimination and citizenship

13. Contrary to the apparent understanding of the district court, we perceive no conflict between the position of the United States government and that of the Korean government.

discrimination are distinct phenomena.[14] Indeed, the Supreme Court held in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 88 (1973), that Title VII was not intended to bar discrimination on the basis of citizenship, reasoning that, "the term 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came." Inherent in the Court's reading of Title VII and its history, is a Congressional determination that a trier of fact can distinguish national origin discrimination from citizenship discrimination and, accordingly, that courts can impose liability on the basis of the former without imposing it for the latter.

KAL stresses the economic burden that will result from requiring foreign businesses to defend in court the motivation behind their personnel decisions, and also expresses concern about the likelihood of confusion or local prejudice on the part of factfinders. It argues that these concerns will have the effect of discouraging foreign businesses from exercising their Article VIII(1) right and, therefore, will ultimately discourage foreign investment in the United States contrary to the intent of the Treaty. These concerns are certainly not fanciful and it is reasonable to expect that they may have some impact on the decisionmaking of foreign businesses operating in the United States. On the other hand, defending personnel decisions is a fact of business life

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14. In *Sumitomo*, the Court of Appeals apparently perceived a conflict between Article VIII(1) and Title VIII's proscription of intentional discrimination since it suggested that the two could only be reconciled by a modified application the BFOQ exception and since resort to the BFOQ is triggered only upon a finding of intentional discrimination. Because we perceive no conflict, we need not rely on a watered down version of the BFOQ defense. We note, however, that when the issue is whether the use of foreign managers is reasonably necessary to the success of a foreign business in the United States, which is the jury's inquiry under the Second Circuit's approach, the foreign employer faces a different, and considerably more difficult, burden than when the issue is simply whether it favored its own citizens because they were such citizens, which is the jury's inquiry under our analysis.

in contemporary America and is a burden that the domestic competitors of foreign enterprise have been required to shoulder. Moreover, while we recognize that factfinders can and do err from time to time, the relevant issue is whether there is reason to believe that the instances of error will be materially greater in Title VII and ADEA cases where a foreign employer has exercised its Article VIII(1) right than in other cases filed under those statutes. Where a foreign business has chosen one of its own citizens, as an executive because he or she is such a citizen, we think the plaintiff is no more likely to succeed than any other employment discrimination plaintiff in convincing the trier of fact that the decision was made for some different, impermissible reason.

For these reasons, we conclude that there is no logical or pragmatic conflict between the right of foreign businesses under Article VIII(1) to engage their own citizens as managers because of their citizenship and the right of employees in the United States to be free from intentional race, age, and national discrimination.[15] As a result, we hold that the district court erred in concluding that MacNamara's disparate treatment claims could not go forward.

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15. We also conclude that even in the context of so-called "mixed motive" cases, there is no logical conflict between the right conferred on foreign businesses by Article VIII(1) and liability for intentional race, national original, and age discrimination under Title VII and the ADEA. This court has held that, even when a plaintiff can prove that an impermissible consideration was a substantial or motivating factor in an employer's disputed conduct, the plaintiff will not prevail unless he or she can further show that "but for" the impermissible factor, the challenged conduct would not have occurred. *Lewis v. University of Pittsburgh*, 725 F.2d 910, 914-916 (3rd Cir. 1983). This rule in the context of the present case means that KAL can be found liable only if MacNamara can establish that but for race, national origin, or age. KAL would not have dismissed him. Thus, even where a desire to favor one's own citizens may have played some role in a decision to replace an employee, there can be no liability unless the same decision would not have been made absent the race, national origin, or age of the replaced individual.

Having concluded that KAL cannot purposefully discriminate on the basis of age, race, or national origin, we now turn to the most difficult aspect of this case. To this point we have confined our analysis to liability for *intentional* discrimination. The reach of Title VII and the ADEA, however, extends beyond intentionally discriminatory employment policies to those practices fair in form, but discriminatory in operation. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Accordingly, Title VII and ADEA liability can be found where facially neutral employment practices have a discriminatory effect or "disparate impact" on protected groups, without proof that the employer adopted these practices with a discriminatory motive. *See. e.g., Watson v. Fort Worth Bank & Trust,* 487 U.S. ____, 108 S.Ct. 2891 (1988). As we have noted, MacNamara complains because KAL has replaced all its "American" sales managers with "Koreans." This, together with counsel's comments at oral argument, suggests that he is challenging the practice of favoring Korean nationals on the ground that it has the *effect* of discriminating against others on grounds of race or national origin. *See, e.g., Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973). In establishing this kind of disparate impact liability, parties generally rely exclusively on statistical evidence of disproportionate effect. As the Supreme Court recently explained in *Watson v. Fort Worth Bank & Trust,* 108 S. Ct. at 2784-2785: "[t]he factual issues and the character of the evidence are inevitably somewhat different when the plaintiff is exempted from the need to prove intentional discrimination. . . . The evidence in these 'disparate impact' cases usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities." (citations omitted).

The fact that empirical evidence can satisfy the substantive standard of liability would pose a substantial problem in disparate impact litigation for corporations hailing

from countries, including perhaps Korea, whose populations are largely homogeneous. Because a company's requirement that its employees be citizens of the homogeneous country from which it hails means that almost all of its employees will be of the same national origin and race, the statistical disparity between otherwise qualified non-citizens of a particular race and national origin, and citizens of the foreign country's race and national origin is likely to be substantial. As a result, a foreign business from a country with a homogenous population, by merely exercising its protected Treaty right to prefer its own citizens for management positions, could be held in violation of Title VII. Thus, unlike a *disparate treatment* case where liability cannot be imposed without an affirmative finding that the employer was not simply exercising its Article VIII(1) right, a *disparate impact* case can result in liability where the employer did nothing more than exercise that right.

For this reason, we conclude that disparate impact liability under Title VII and the ADEA for a foreign employer based on its practice of engaging its own nationals as managers cannot be reconciled with Article VIII(1). Accordingly, we hold that such liability may not be imposed.

In concluding that Title VII and ADEA liability based on disparate impact, and not disparate treatment, conflicts with Article VIII(1), we are mindful that the statistical evidence supporting a claim of disparate impact often resembles that used to help establish disparate treatment. *See, e.g., Green v. USX Corporation,* 843 F.2d 1511 (3d Cir. 1988). Although in the area of statistical evidence our conclusion is admittedly more difficult, we nevertheless believe that, where the empirical disparity is explainable on the basis of a company's exercise of its Article VIII(1) rights, the likelihood of an erroneous finding that the employer intentionally discriminated on a basis other than citizenship is slight. As a result, unlike our conclusion with respect to disparate impact, we are unable to perceive a theoretical or

pragmatic inconsistency between, on the one hand, the substantive standard establishing disparate treatment liability and, on the other hand, a recognition of Article VIII(1) rights.

With respect to disparate impact liability, we hold that MacNamara may not proceed with any claim that KAL violated Title VII by replacing its Caucasian American sales managers with Koreans without regard to its subjective intent.

V.

The summary judgment entered in KAL's favor will be reversed and the case will be remanded for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

THOMAS V. MACNAMARA	:	CIVIL ACTION
v.	:	
KOREAN AIR LINES	:	NO. 82-5085

MEMORANDUM

GILES, J. NOVEMBER 6, 1987

I. INTRODUCTION

In this employment discrimination action, defendant Korean Air Lines (KAL) seeks the entry of summary judgment.[1] Defendant contends that the Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, United States — Korea, 8 U.S.T. 2217, T.I.A.S. No. 3947 (FCN Treaty or Treaty), gives KAL, a Korean corporation, the unfettered right to engage and terminate executives without regard to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* (1982) (Title VII), and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, *et seq.* (1982) (ADEA).

Plaintiff Thomas V. MacNamara (MacNamara) was employed as a district sales manager by KAL until he was terminated on June 15, 1982. Plaintiff is a 57 year-old American white male. He alleges discrimination on the basis of race, national origin and age prohibited by Title VII and the ADEA[2] because he was replaced by Wan Gin Chung (Chung), a 42 year-old Korean. Plaintiff also claims

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1. Presently before the court is the motion to dismiss of defendant. Since the court will consider matters outside the pleadings the motion shall be decided as one for summary judgment pursuant to Fed. R. Civ. P. 12(c).

2. Plaintiff does not allege a claim under 42 U.S.C. § 1981 (1982).

that his termination caused a deprivation of benefits due under the KAL pension plan in violation of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1104(a)(1) (1982) (ERISA).

Article VIII(1) of the FCN Treaty provides, in part, that "[n]ationals and companies of either Party shall be permitted to engage, within the territories of the other Party, . . . executive personnel . . . and other specialists of their choice." 8 U.S.T. at 2223. KAL contends that plaintiff was an "executive" within the meaning of the Treaty language when employed as the district sales manager in Philadelphia with reporting responsibilities to the KAL Regional office in New York City and its headquarters in Seoul. (MacNamara Deposition N.T. 23). Further, it maintains that his replacement was likewise an "executive." KAL also urges that the word "engage" necessarily encompasses the hiring and firing of executive personnel.

Plaintiff argues that Congress, in enacting Title VII and its prohibitions against national origin discrimination, impliedly repealed any Treaty provisions capable of being construed as exempting foreign corporations doing business in the United States from compliance with its anti-discrimination laws. Plaintiff also contends that this court could find that plaintiff was not an executive, thereby avoiding the Treaty construction or collision problem. Further, plaintiff reasons that while the word "engage" encompasses the right to hire, it does not apply to discharges for discriminatory reasons that violate the employment or labor laws of this country. Since I conclude that plaintiff is an executive under the Treaty, I must confront the question of the relationship of the Treaty to Title VII. In doing so, I find that the provisions of the Treaty have not been clearly repealed by Congress and that its terms control. Accordingly, summary judgment shall be granted in favor of KAL.

II. HISTORY OF THE TREATY

When signed by the President of the United States, the FCN Treaty became part of the domestic law of this country without the necessity of further legislative action. *See, e.g., Asakura v. City of Seattle,* 265 U.S. 332, 341 (1924). It is part of the "supreme Law of the Land" under Article VI, cl. II of the United States Constitution and supercedes inconsistent state law. *United States v. Pink,* 315 U.S. 203, 230-31 (1942).

The Treaty is one of many such treaties adopted by Congress after World War II. *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176, 185 (1982). These treaties accorded United States corporations the right to conduct business in other countries whereas prior to World War II the treaties only gave corporations legal status and access to foreign courts. *Id.* at 186-87. This was recognized as a major breakthrough for American commerce in foreign posts.

> Perhaps the most striking advance of the postwar treaties is the cognizance taken of the widespread use of the corporate form of business organization in present-day economic affairs. In the treaties antedating World War II American corporations were specifically assured only small protection against possible discriminatory treatment in foreign countries. In the postwar treaties, however, corporations are accorded essentially the same treaty rights as individuals in such vital matters as the right to do business, taxation on a nondiscriminatory basis, the acquisition and enjoyment of real and personal property, and the application of exchange controls. Furthermore, the citizens and corporations of one country are given substantial rights in connection with forming local subsidiaries under the corporation laws of the other country and controlling and managing the affairs of such local companies.

Sumitomo Shoji America, 457 U.S. at 187 n.17 (quoting Commercial Treaties: Hearing on Treaties of Friendship,

Commerce and Navigation Between the United States and Colombia, Israel, Ethiopia, Italy, Denmark and Greece before a Subcommittee of the Senate Committee on Foreign Relations, 82d Cong., 2d Sess. 4-5 (1952) (opening statement of Harold Linder, Deputy Assistant Secretary of State for Economic Affairs)). Similarly, corporations from those foreign countries now seek reciprocal business advantages in this country.

These treaties are purely "commercial" in nature. Foreign corporations are assured that they will be able to manage their own investments in the host countries without interference.

> In United States practice, although 'friendship' is attributed an honored place in the title and although the conclusion of a treaty presupposes friendliness and goodwill between the signatories, these treaties are not political in character. Rather, they are fundamentally economic and legal. Moreover, though 'commerce' and 'navigation' complete the title and accurately describe part of their content, their concern nowadays is only secondarily with foreign trade and shipping. They are 'commercial' in the broadest sense of the term; and they are above-all treaties of 'establishment,' concerned with the protection of persons, natural and judicial, and of the property and interests of other persons. They define the treatment each country owes the nationals of the other; their rights to engage in business and other activities within the boundaries of the former; and the respect due them, their property and their enterprises.

Walker, Modern Treaties of Friendship, Commerce and Navigation, 42 Minn. L. Rev. 805, 806 (1958).

The post-war FCN treaties, including the Korean Treaty, contain three basic standards of treatment: national treatment, most-favored-nation treatment, and absolute rules. *See id.* at 810-11. "National treatment" entitles foreign corporations and any locally incorporated subsidiaries

to the same rights and subjects them to the same responsibilities as domestic companies. *Sumitomo Shoji America,* 457 U.S. at 188 n.18. Where the treaty parties were unwilling to grant national treatment, "most-favored-nation treatment" was accorded. This means that the treatment of a foreign company in the host country will be no less favorable than the treatment accorded to the company of any third country in like situations. *Id.*

There are also non-contingent standards, or "absolute" rules in the formulation of treaty provisions. Walker, *supra,* at 811. The "absolute rules" contained in the treaties technically go beyond national treatment to provide a minimal level of rights to foreign corporations regardless of whether the host government accords the same rights to its domestic corporations.

> There is also a certain margin for the play of non-contingent standards, or "absolute" rules, in the formulation of treaty provisions. This is rule-making in independent terms, without reference to the treatment given to others. Although non-contingent standards, because of their implication of definiteness might at first blush appear to provide the avenue to provisions of maximum positiveness and efficacy, the utility of the approach is in fact quite limited. The scope of these treaties is such that, to be manageable, their content of rules must be stated essentially in a summary or simple fashion. A summary contingent rule has definiteness, because its content is measured against a determinable pole of reference. But a summary non-contingent rule may often be considerably less than so, when reduced to language of agreement between nations of unlike faculties of appreciation and different cultural and juridic backgrounds. The need for avoiding rigidity—freezing today's wisdom into tomorrow's folly—can not, in our international tower of Babel be served by the same semantics that have so successfully kept the

> American Constitution abreast of the times; *raisonnable* is not the "reasonable" of American jurisprudence, nor is our "due process of law" faithfully translatable into a foreign language.
>
> An attempt to construct a treaty primarily in non-contingent terms can prove self-defeating because increases in specificity spawn corresponding increases in reservations. This tends to rob the reference rules of the very definiteness it was their aim to accomplish. You agree to something concrete, but reserve your "public policy" or your "internal legislation." This is for the twofold reason that prudent governments will wish escapes for future contingencies and will also wish to avoid purporting to attribute to aliens independent rights placing them in a privileged status over citizens of the country. Contingent standards, by contrast, carry built-in automatic equalization and adjustment mechanisms. Therefore, the non-contingent standard generally finds its best utility in a few contexts in which, no contingent standard being adequate, some recognizable body of applicable international law and terms of art has nevertheless evolved, it is also used at times *faute de mieux,* or to suggest a general guide-post of behavior *en principe,* or to solve some special problem.

Id. at 811-812.

III. INTERPRETATION OF THE TREATY

A. *The Treaty Permits Treaty Parties to Engage Essential Personnel of Their Choice*

KAL contends that Article VIII(1) of the Korean FCN Treaty is an absolute rule which confers on the treaty party an unconditional freedom of choice in the selection of certain personnel to manage the investment of the party in the host country. Article VIII(1) of the Korean FNC Treaty reads in full:

> Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of a profession within the territories of such other party for the particular purpose of making examinations, audits and technical investigations for and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.

8 U.S.T. 2217, 2223.

Of the court's function in Treaty language construction, the Supreme Court has stated:

> Our role is limited to giving effect to the intent of the Treaty parties. When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear Treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation.

Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 185 (1982) (footnote omitted). Only when Congress clearly intends to depart from the obligations of a Treaty will inconsistent federal legislation govern. *McCulloch v. Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10, 21-22 (1963); *see also Cook v. United States,* 288 U.S. 102, 120 (1933) (when a treaty conflicts with a subsequent act of Congress that act will generally supercede the treaty only if Congress expressed a clear intent to override the treaty or any of its provisions). "Thus, unless federal civil rights laws reflect an affirmative disavowal of the rights provided by [a]

treaty, it is [the court's] duty to implement the Treaty rights." *Spiess v. C. Itoh & Co. (America),* 643 F.2d 353, 356 (5th Cir. 1981), *vacated on other grounds,* 457 U.S. 1127 (1982).

Further, "[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight." *Kolovrat v. Oregon,* 366 U.S. 187, 194 (1961). This court requested and considers the memorandum submitted by the United States Department of State as *amicus curiae* and the official view of the Ministry of Foreign Affairs of the Republic of Korea. Exhibit 1, KAL's Second Supplemental Memorandum of Law in Support of its Motion to Dismiss.

It is unlikely that the United States, which insisted upon language identical to that in Article VIII(1) in various contemporaneous FCN treaties, had in mind a different meaning for the same words. Many foreign countries objected to the provision and unsuccessfully sought its deletion. *See Sumitomo Shoji America,* 457 U.S. at 181 n.6. Generally, the purpose of the United States' insistence upon the provision was " 'to prevent the imposition of ultranationalistic policies with respect to essential executive and technical personnel.' " *Id.* (quoting Walker, *Provisions on Companies in United States Commercial Treaties,* 50 Am. J. Int'l L. 373, 386 (1956)). For example, in the instance of the German FCN Treaty, Article VIII(1) was considered by the United States to be a limited but necessary step to insure "efficient functioning of a business enterprise" in connection with its corporation's internal affairs in the host country. *See* Note Dated December 15, 1953 (Ex. 12), Foreign Service of the United States of America to the German Federal Ministry of Foreign Affairs. The contemporaneous treaties demonstrate that the phrase "of their choice" was meant to guarantee to the foreign corporation of the Treaty Party that local employment requirements, which might emanate from unforeseeable ultranationalistic motives,

would not be used to interfere with the conduct of that corporation's management of its own internal affairs. The use of the phrase seems to have excepted from any such local laws only those personnel whose services are essential to the functioning of a business enterprise, whether they be executives, accountants, lawyers, or any other person whose function is deemed necessary to the efficient conduct of the business and protection of the foreign investment.

From this general FCN Treaty history, I infer from the "of their choice" language of Article VIII(1) of the United States-Korea Treaty that the intent of the United States was to except from the impact of a host country's domestic employment laws only those personnel who were directly involved in the company's policymaking, directly involved in the administration of that policy, or who were engaged to provide an essential technical service and reported the economic or legal status of the enterprise directly to the company's top management.

In one instance, this exception from local hiring requirements appears to have been negotiated knowing that it might be contrary to the host country's laws on discrimination in employment. In 1949, Uruguay proposed that a foreign corporation's freedom of choice be modified by the provision ". . . discrimination against nationals of the other party shall be avoided, and without prejudice to laws designed to protect their employment." Dept. of State Airgram No. 385 from U.S. Embassy, Montevideo, to the Dept. of State, Nov. 8, 1949. This proposal was rejected by the United States and the "freedom of choice" language was retained.

In the negotiation of some FCN treaties, the United States demonstrated a specific understanding that the right of a foreign corporation to engage certain essential personnel would be subject to the laws of the host country. The FCN treaty with Pakistan provided:

> Nationals and companies of either party shall be permitted, in accordance with the applicable laws, to engage, within the territories of the other Party, . . . executive personnel . . . of their choice.

Treaty of Friendship and Commerce, Nov. 12, 1959, United States-Pakistan, Art. VIII, 12 U.S.T. 110-114, T.I.A.S. No. 4683.

There is no limiting language in the Korean treaty, though clearly there could have been, if desired. Hence, it is reasonable to infer that the United States' intent and understanding was that, unless modified, "freedom of choice" was unconditional as to essential personnel. It is further reasonable to assume that Korea must have given that language its plain meaning. Nothing indicates to the contrary. Consequently, this court must recognize that the language of the Korean FCN treaty is "clear on its face" with respect to the unfettered right of a treaty party corporation to engage the essential personnel of their choice as set out in Article VIII(1).

Plaintiff argues that the phrase "executive personnel" in Article VIII(1) must be interpreted as limited to officers or directors of a company. This contention is rejected because the scope of the Article VIII(1) declaration of the right to engage personnel of choice extends by its terms to agents and technical experts. The right of choice of Article VIII(1) is limited by the inference that employment of those persons must be essential to the operations of the company or management of the foreign investment in the host country. Article VIII(1) does not use the generalized word "employee," but rather refers to specialists, for example, accountants and attorneys, who would normally be engaged to perform services which might be considered confidential in nature. Indeed, the catch-all phrase "and other specialists of their choice" appears to describe all the foregoing positions as specialists.

As District Sales Manager of the KAL Philadelphia District Office, plaintiff devoted all his employment energies to the direction of KAL's commercial success in a tri-state area. In his line of reporting, he was privy to the formulation of corporate policy in areas of sales and personnel management and was responsible for implementing on his own, or as directed by the chief of American KAL operations or by Seoul headquarters, company policy designed to promote the financial interests of the company. Regardless of title, one would at least have to describe plaintiff as a special agent for the conduct of KAL's business in this country.

B. *Plaintiff and His Replacement Were Executives Within the Meaning of the FCN Treaty*

Plaintiff supervised the airline's marketing activities in Pennsylvania, Delaware and the Southern half of New Jersey. (MacNamara Deposition N.T. 48). His salary as Sales Manager was $23,000 per year. (N.T. 41). He reported monthly on the status of KAL's operations in the district directly to the KAL Vice-President of Marketing for worldwide operations in Seoul, and to the Vice-President of Marketing for North America located in New York. (N.T. 22, 48). He was solely responsible for the hiring, firing, discipline and direct supervision of the four to six full time employees in the office. (N.T. 48-63). He directed the assembly and maintenance of all necessary sales and productivity information. (N.T. 66-74). He evaluated employee job performance and recommended promotions. (N.T. 113-15). Those managerial functions consumed almost all of plaintiff's working time. Further, he issued all signed checks to pay for rent, office equipment and sales promotion expenses, and was responsible for the direction of all cargo and passenger sales within the district. (N.T. 83-112, 115-35). As district manager, he was also responsible for the preparation of marketing plans to cover the activities of KAL in the district as well as the objectives for the sales staff. (N.T. 74-76). Marketing plans included recommendations and analyses to the Regional Headquarters regarding

ways to improve the identification of KAL in the airline market. (N.T. 75-77). He implemented certain marketing strategic changes without specific authorization from the Regional Headquarters. (N.T. 80-81, 135). He maintained a working fund bank account for KAL with Philadelphia National Bank and negotiated the lease of office space. (N.T. 115-16, 119).

From 1974 to 1976, Mr. Choi was the Philadelphia district manager. (N.T. 27). He was promoted and transferred to Seoul, South Korea as the manager for charter planning for KAL. (N.T. 23). He was succeeded by Mr. Won Jung Lee, who had come from Seoul to assume the manager duties. (N.T. 23-24). Mr. MacNamara succeeded to all the duties and responsibilities, including reporting requirements, which befell Mr. Lee, and before him, Mr. Choi. (N.T. 28).

The test for exempt executive status under an analogous statute, the Fair Labor Standards Act, 29 U.S.C. § 213(a)(1) (1982), requires that an employee must earn a weekly salary of at least $155.00, have the primary duty of managing the enterprise or subdivision thereof, and must customarily and regularly direct the work of two or more employees. 29 C.F.R. §§ 541.1(a), (b) & (f) (1986). *See Guthrie v. Lady Jane Collieries, Inc.*, 722 F.2d 1141 (3d Cir. 1983). Each of these criteria has been met in plaintiff's case.

Plaintiff himself described his position as one within management. (MacNamara Deposition N.T. 44). Unquestionably, plaintiff's job responsibilities and duties were executive in nature and essential to the administration of policy of the company.

KAL made a decision to eliminate the Philadelphia and Atlanta district manager positions and to consolidate control in a single district manager located in Washington, D.C. That manager, Mr. S. K. Hong, is a Korean national having treaty trader status. His duties include ongoing direct and personal dealings with Korean embassy personnel in

Washington, D.C. and he is an official member of the Korean government's delegation to negotiate bilateral air transport agreements with the United States. Affidavit of S. K. Hong, Exhibit 2, Defendant's Second Supplemental Memorandum in Support of its Motion to Dismiss. KAL submits that it had the right to manage its investment by consolidating its business operations and to replace plaintiff with one of its citizens of treaty trader alien status.

The phrase "executive personnel" is not defined in the Treaty. Beyond acknowledging that KAL regarded plaintiff as an executive within the organization, there are few guides for assessing whether plaintiff's employment status could reasonably be said to have been within the Treaty Party's contemplation of "executive personnel." The Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1101, *et seq.* (INA), which was enacted to complement all Friendship, Commerce and Navigation Treaties, enumerates the powers or authority an employee must possess within the foreign company's structure to gain entry into the United States as a "treaty trader." The INA provides that a visa may issue to an alien if the purpose of entry is

> (i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national; or (ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise of which he is actively in the process of investing, a substantial amount of capital.

8 U.S.C. § 1101(a)(15)(E) (1982).

The State Department is responsible for implementing the statutory mandate. 8 U.S.C. § 1201(a) (1982). Its decisions are subject to minimal judicial review. *Kun Young Kim v. District Director of the U. S. Immigration and Naturalization Service,* 586 F.2d 713, 715-16 (9th Cir. 1978). Therefore, courts give considerable weight to the more detailed definition of "treaty trader" in the State Department Regulation:

> An alien shall be classifiable as a nonimmigrant treaty trader if he establishes to the satisfaction of the consular officer that he qualifies under the provisions of section 101(a)(15)(E)(i) of the Act and that: (1) He intends to depart from the United States upon the termination of his status; and (2) if he is employed by a foreign person or organization having the nationality of the treaty country which is engaged in substantial trade as contemplated by section 101(a)(15)(E)(i), he will be engaged in duties of a supervisory or executive character, or, if he is or will be employed in a minor capacity, he has special qualifications that will make his services essential to the efficient operation of the employer's enterprise and will not be employed solely in an unskilled manual capacity.

22 C.F.R. § 41.40(a) (1987). Unquestionably, KAL is engaged in substantial trade and the District Sales Manager position was one of obvious supervisory capacity. Consequently, it would be reasonable for a foreign corporation engaged in business cognizable under the Treaty to presume District Sales Managers should qualify as supervisors or executives for purposes of "treaty trader" status.

Pursuant to this court's request the United States Department of State, joined by the Equal Employment Opportunity Commission, and the Ministry of Foreign Affairs of the Republic of Korea submitted their positions on interpretation of the FCN Treaty. The Department of State does not attempt to address the meaning of the words "of their choice," but suggests that the purpose of the phrase was to allow American companies operating overseas to hire American citizens or third country nationals for key positions in a country that might have national laws against the hiring of aliens for such positions. The suggested reading of the Department of State of the treaty provisions are not bolstered by any negotiation history or correspondence between the parties. While the State Department's views are

normally entitled to deference, where the crucial language is not clarified in the context of the treaty parties' particular negotiations, deference is not required. Rather, the court is required to give a fair reading to the plain language of the treaty considering the document as a whole. *Sullivan v. Kidd,* 254 U.S. 433, 439 (1920).

The Korean Ministry of Foreign Affairs' view of Article VIII(1) is that in its country, the treaty is a special law which takes precedence over prior domestic and general laws. Therefore, the Korean government views the FCN treaty as taking precedence over any domestic law of the host country which conflicts with its terms. In its opinion, the phrase "of their choice" must be interpreted to entitle the foreign employer to decision making or free discretion in regard to hiring or engagement in the host country and that the word "engagement" naturally includes termination. Further, the Korean government regards the FCN treaty as applicable only to the people or citizens of the two signatory countries. Consequently, it would appear that Korea would interpret the phrase "of their choice" to apply only to "nationals" of the foreign country doing business in the host country. Exhibit 1, KAL's Second Supplemental Memorandum of Law in Support of its Motion to Dismiss.

I find the Korean government's interpretation of the FCN Treaty consistent with a fair reading of the document as a whole.

KAL suggests that this interpretation is supported by the fact that the INA was enacted to complement all FCN treaties. The Treaty Trader provisions of the INA track the language of Article II of the Korean FCN Treaty. *See* 8 U.S.C. § 1101(a) and 8 U.S.T. at 2219. All persons who qualify under those INA provisions must certify and that establish that they are citizens of the foreign country and will be engaged in supervisory or executive duties on behalf of a commercial enterprise covered by the treaty. Therefore, KAL argues that, read together, the Treaty Trader provisions and Article VIII(1) indicate an intent on the part of

the United States and other treaty parties to safeguard the right of foreign companies to select their own citizens for managerial positions without having to justify those employment decisions under the host country's domestic laws. KAL urges that Article VIII(1) be read to become effective only when the foreign corporation selects a Treaty Trader for a managerial or other position enumerated in that article. I agree. Article VIII(1) of the Korean FCN treaty gave Korean corporations the right to select nationals who have Treaty Trader status as executive personnel without regard to American employment laws. As discussed *infra* at 20-24, neither Title VII nor the ADEA abrogated those Treaty obligations and the Treaty has to be recognized as a narrow exception to them.

It does not matter that plaintiff's employment discrimination claim is based upon age, race and national origin, and not upon citizenship. The FCN Treaty gives protection to the Korean corporation to make its employment decisions in limited areas without regard to domestic employment laws. Allegedly, plaintiff was discriminated against in favor of a Korean citizen of Treaty Trader Status, who unquestionably qualifies as an executive or manager. Plaintiff argues that he should be allowed to show that the motivation for his firing or lay-off was not citizenship but age, race and national origin. However, to allow plaintiff to proceed would negate the "of their choice" FCN treaty language and require the treaty party to justify on a business necessity basis the action taken, undermining the treaty commitment to permit treaty parties to control and manage the business enterprise in the host country.

C. *The Korean FCN Treaty Prevails Over Title VII and the ADEA*

In *Sumitomo Shoji America, Inc. v. Avigliano,* 457 U.S. 176, 180 n.4 (1982), the Supreme Court was presented with, but did not decide, the question of whether the "of their choice" Article VIII(1) language in the Japan FNC Treaty prevailed over Title VII's ban on certain forms of

employment discrimination. *Sumitomo* was an appeal from the Second Circuit and involved a wholly owned subsidiary of a Japanese company which was incorporated under New York law. *Id.* at 178-79. In seeking to dismiss the complaint pursuant to Fed. R- Civ. P. 12(b)(6), the American subsidiary argued that it enjoyed the parent's treaty advantages under Article VIII(1) of engaging certain personnel of its choice without regard to Title VII. *Id.* The Supreme Court held that the American corporation, though a wholly owned subsidiary of a foreign corporation, was not covered by the Treaty. *Id.* at 189. Since the subsidiary was subject to Title VII, the court did not have to decide whether the parent was also bound by Title VII in the face of the explicit "of their choice" treaty language of Article VIII(1). *Id.*

Previously, both the Second and Fifth Circuits had decided that the American incorporated Japanese subsidiary was covered by the Japanese FCN Treaty, but differed on the question of whether the Treaty had priority over Title VII. In *Avigliano v. Sumitomo Shoji America,* 638 F.2d 552, 557-58 (2d Cir. 1981), *rev'd on other grounds,* 457 U.S. 176 (1982), the Second Circuit held that the Treaty was applicable to the foreign parent's subsidiary but that it was not immune from Title VII's reach. It opined that under certain conditions Japanese citizenship might be a bona fide occupational qualification (bfoq) within the exception to Title VII. *Id.* at 559.

On the other hand, in *Spiess v. C. Itoh & Co. America, Inc.,* 643 F.2d 353, 362-63 (5th Cir. 1981) the Fifth Circuit held that the subsidiary was to be treated as its parent as to all Treaty rights including the benefit of the right to engage certain personnel "of their choice." Regarding Title VII, the Second Circuit found no legislative history or Congressional intent to abrogate the United States' FCN treaty obligations to Japan in this country or to abandon the reciprocal treaty rights and privileges enjoyed by American corporations located in Japan. *Id.* at 362.

An examination of Article VIII(1) shows no need for the expressed alarm that all the labor laws of this country will be emasculated if plain meaning were ascribed to the words of the Treaty. The Treaty would exempt only executives, accountants, attorneys, agents, specialists and technical experts whose services are necessary to insure the operational success of the foreign corporation in the host country. Not every age or service group would be covered among employees "of choice." Since these employees would be of executive, professional, managerial or administrative categories, they would be exempt from the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 213 (1982), and would not be covered employees under the Labor Management Relations Act, 29 U.S.C. §§ 141-87 (1982). Moreover, employees at this level are in a position to make their own bargains or at least to discover before applying for or accepting a position with a foreign corporation that it is doing business in this country pursuant to a Treaty and to ascertain the conditions of employment. If it were within a court's perogative to set policy, which it is not, it would seem that the balance would tip in favor of construing the treaty language plainly and not contorting it to protect what is likely a relatively small number of persons who knowingly assume essential positions which establish or administer the policy and solely advance the financial interests of the employing foreign entity.

In the absence of the clear intent of Congress to disavow the Treaty, it is appropriate to consider whether there is any reconciliation between the Treaty language and Title VII. The Second Circuit has suggested that the bona fide occupational qualification exception of Title VII can be expansively interpreted to accomplish this accommodation. I disagree. That approach would require a court or jury to resolve broad issues beyond those that Congress intended to place before the courts. The bfoq would become the equivalent of the "of their choice" provision, and treaty

parties would submit a broad range of qualifications as bases for the exception. For example, a bfoq exception could exist for cultural and language differences, or for any criteria for personnel which could be said to advance the commercial success of the company, such as "acceptability to those persons with whom the company or branch does business." *Avigliano,* 638 F.2d at 559.

To expand the bfoq exception in an attempt to reconcile Title VII to the Treaty language will only result in "lip service" to Title VII while widening and weakening the heretofore narrow construction given to the bfoq exception. It becomes apparent that there is no reconciliation between the Treaty provisions and Title VII or the ADEA.[3] Consequently, I conclude that this conflict is a matter for Congress and not the courts. The observation of the Fifth Circuit majority in *Spiess* is appropriate here.

> No evidence suggests that Congress intended to repudiate Article VIII(1) when it enacted Title VII. Domestic employment discrimination laws occupy a high priority on the nation's agenda, and courts often resolve statutory conflicts in their favor. In this case, however, resolving doubts in favor of Title VII would go beyond the judicial sphere of interpretation. In the absence of congressional guidance, we decline to abrogate the American government's solemn undertaking with respect to a foreign nation.

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3. The legislative history and the text of the ADEA also do not indicate an intent by Congress to override the Treaty, or any of its provisions. Moreover, the analysis of the conflict between the Treaty and Title VII is persuasive in examining that issue in the context of the ADEA. Courts commonly apply Title VII jurisprudence to ADEA issues. *See Massarsky v. General Motors Corp.,* 706 F.2d 111, 117-18 (3d Cir.), *cert. denied,* 464 U.S. 937 (1983). The common goal of both statutes is to eliminate discrimination in the workplace, and there are no substantial differences between the two sufficient to demonstrate a variance in Congressional intent as to the Treaty.

643 F.2d at 362.

For the foregoing reasons, the motion of KAL for summary judgment is granted.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS V. MACNAMARA	:	CIVIL ACTION
v.	:	
KOREAN AIR LINES	:	NO. 82-5085

ORDER

AND NOW, this 6th day of November, 1987, for the reasons set forth in the foregoing memorandum, it is hereby ORDERED that the motion to dismiss of defendant, considered as a motion for summary judgment, is GRANTED.

BY THE COURT:

James T. Giles, *Judge*

(2)

Supreme Court, U.S.
FILED
MAY 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1449

IN THE

Supreme Court of the United States

October Term, 1988

KOREAN AIR LINES,

Petitioner

v.

THOMAS V. MACNAMARA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF PLAINTIFF-RESPONDENT THOMAS V. MacNAMARA

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1988

QUESTION PRESENTED

Whether the Treaty of Friendship, Commerce, and Navigation between the United States and the Republic of Korea and Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 can be construed in a manner that would preserve for an American employee terminated by a Korean corporation from a job in the United States the rights and remedies provided by the United States' anti-discrimination laws for intentional discrimination in an action which alleges that said termination occurred as a result of discrimination on the basis of race, age, and/or national origin?

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Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229 (1956) 7

TREATY, STATUTES AND REGULATIONS INVOLVED

1. Article VIII(1) of the Treaty of Friendship, Commerce, and Navigation, between the United States and the Republic of Korea, 8 U.S.T. 2217, T.I.A.S. No. 3947 (1957) provides in relevant part (8 U.S.T. at 2223):

> Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of a profession within the territories of such other Party, for the particular purpose of making examinations, audits and technical investigations for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.

2. Respondent is satisfied with Petitioner's statement of the statutes and regulations involved, and pursuant to S.Ct.R. 34.2 does not include a separate statement thereof.

IN THE

Supreme Court of the United States

October Term, 1988

No. 88-1449

KOREAN AIR LINES,

Petitioner

v.

THOMAS V. MACNAMARA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF PLAINTIFF- RESPONDENT THOMAS V. MacNAMARA

Thomas V. MacNamara files this brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit pursuant to the request of this Court.

STATEMENT OF THE CASE

Petitioner, Thomas V. MacNamara ("MacNamara") is a white American citizen who was employed beginning in August 1974 by Korean Air Lines ("KAL"), defendant below, a Korean Corporation which operates branch offices in the United States. During the course of his employment, MacNamara held several positions. From December 1977 until June 15, 1982, the date of his termination, he was a District Sales Manager based in Philadelphia. At the time of his termination, MacNamara was age 57 and was replaced by a 42 year old Korean national who entered the United States pursuant to an E-1 treaty trader visa. At or around the time of his termination, MacNamara alleges KAL replaced other white district sales managers at its branch offices in the United States and replaced them with Korean nationals under the age of 50.

After exhausting his administrative remedies, MacNamara filed suit against KAL on November 15, 1982. The Complaint alleged that MacNamara was dismissed by KAL for reasons constituting age discrimination in violation of the Age Discrimination in Employment Act, as amended ("ADEA"), 29 U.S.C. §621 *et. seq.*, and race and national origin discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. §2000e, *et. seq.* Additionally, it was alleged that MacNamara's discharge by KAL was in violation of the Employment Retirement Income Security Act, 29 U.S.C. §1001, *et. seq.* The District Court's jurisdiction was also invoked under 28 U.S.C. §1331.

KAL moved to dismiss the Complaint under Fed. R.Civ.P. 12(b)(6) on the basis of Article VIII(1) of the Korean Friendship, Commerce, and Navigation Treaty ("Korean FCN Treaty") 8 U.S.T. 2217, 2223, T.I.A.S. No. 3947.

The District Court considered KAL's motion to dismiss as one for summary judgment pursuant to Rule 56.

In its Opinion entered November 9, 1987, the District Court granted summary judgment in favor of KAL, holding that the Korean FCN Treaty gave KAL an unfettered right to engage essential personnel of its choice without regard to domestic employment laws. (A-36).[1] Further, the District Court determined that MacNamara was an executive for purposes of the Korean FCN Treaty and that therefore his termination was shielded by the provisions of the Korean FCN Treaty. (A-38, A-42).

MacNamara then appealed this matter to the United States Court of Appeals for the Third Circuit. On appeal, the Third Circuit reversed. The Third Circuit held that Article VIII(1) was not intended to provide foreign businesses with shelter from any law applicable to personnel decisions other than those that would logically or pragmatically conflict with the right to select their own nationals as managers because of their citizenship. (A-9). The Third Circuit concluded that insofar as Title VII and the ADEA proscribed intentional discrimination on the basis of race, national origin, and age, the court perceived no theoretical or practical conflict between them and the right conferred by Article VIII(1) of the Korean FCN Treaty. (A-9). The Third Circuit then went on to note that to the extent that Title VII and the ADEA proscribed personnel decisions based on citizenship solely because of their disparate impact on older managers, a particular racial group, or persons whose ancestors are not from the foreign country involved, a potential conflict existed between those laws and the Korean FCN Treaty which must be resolved in favor of the Treaty. (A-9).

The Court of Appeals also determined that the right to "engage" executives of its choice pursuant to the Korean FCN Treaty included both KAL's decision to fire

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1. References herein to items contained in the Appendix of KAL's Petition for a Writ of Certiorari will be cited as "(A -)".

MacNamara and the reassignment of his duties to a Korean national. (A-10). The Court held that the issue of MacNamara's status as an "executive" was not the appropriate inquiry, instead, the status of his replacement was the relevant inquiry. (A-11). Since MacNamara's replacement, Mr. Chung, entered the United States pursuant to an E-1 treaty trader visa and was regional manager for the territory from Pennsylvania to Florida, Mr. Chung was determined by the court to be an executive for the purposes of Article VIII(1) of the Korean FCN Treaty. (A-12).

The Third Circuit remanded the case for further proceedings consistent with its Opinion. On March 3, 1989, KAL filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit with this Court arguing that the Third Circuit's decision should be reversed because KAL was immune under the Korean FCN Treaty from any action challenging its employment decisions pursuant to the anti-discrimination laws of the United States. MacNamara's Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit was docketed in this Court on March 20, 1989. (*Thomas V. MacNamara v. Korean Airlines*, No. 88-1551). It was argued therein that the Third Circuit decision should be reversed because MacNamara was entitled to all rights and remedies granted by the United States' anti-discrimination laws without regard to the provisions of the Korean FCN Treaty.

ARGUMENT

The United States Court of Appeals for the Third Circuit has constructed a framework whereby the anti-discrimination protections granted to employees by Title VII and the ADEA can be reconciled with the freedom of choice granted to foreign employers by Article VIII(1) of the Korean FCN Treaty to employ their own nationals as

managers because of their citizenship. This balance is achieved by examining the purposes and goals of the anti-discrimination laws and the Korean FCN Treaty.[2] Title VII and the ADEA grant employees protection from having employment decisions based on six specific grounds — race, color, religion, sex, national origin, and age. Article VIII(1) of the Korean FCN Treaty states, in pertinent part, that "nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, . . . executive personnel . . . of their choice."

The appellate court concluded[3] that the "of their

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2. MacNamara has filed a Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit. (*Thomas V. MacNamara v. Korean Airlines*, No. 88-1551). In his Cross-Petition, MacNamara has argued that the Third Circuit's interpretation of the anti-discrimination laws *vis-a-vis* the Korean FCN Treaty is too restrictive, and that he should be permitted to present evidence relating to disparate impact discrimination in addition to presenting a case relating to disparate treatment. This brief is being filed at the request of the Court in response to KAL's position in its Petition for a Writ of Certiorari that the Third Circuit's decision should be reversed because no cause of action under the Title VII and the ADEA should be permitted. MacNamara does not waive his argument as set forth in the Cross-Petition, but is presenting herein his position that, in the event that this Court does not grant his Cross-Petition, the Court should uphold the Third Circuit's ruling which at least maintains a portion of the protection granted to workers by the anti-discrimination laws of the United States.

3. This is also the conclusion of the Sixth Circuit Court of Appeals in *Wickes v. Olympic Airways*, 745 F.2d 363 (6th Cir. 1984). In addition to the Third and Sixth Circuits, the Second and Fifth Circuits have considered the issue of what balance to strike between provisions similar to those in Article VIII(1) and the anti-discrimination laws. In *Avagliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2nd Cir. 1981), *vacated on other grounds and remanded*, 457 U.S. 176, 102 S.Ct. 2374 (1982), this Court held that FCN Treaty privileges do not apply to American subsidiaries of foreign businesses and those subsidiaries are subject to all domestic

(footnote continued on next page)

choice" language is limited by the context of the Korean FCN Treaty. This limitation is that Article VIII(1) is "not intended to provide foreign businesses with shelter from any law applicable to personnel decisions other than those that would logically or pragmatically conflict with the right to select one's own nationals as managers *because of their citizenship.*" (A-9, emphasis original). The Third Circuit recognized that pursuant to the Korean FCN Treaty, foreign corporations could make employment decisions based on citizenship, and that the anti-discrimination laws did not prohibit employment decisions based upon citizenship. Thus, where the employment decision was based solely upon citizenship any conflict created between the anti-discrimination laws and the Korean FCN Treaty would be one in which the Korean FCN Treaty would have to prevail. On the other hand, if the employment decision was one based on race, national origin or age, there was nothing in the Korean FCN Treaty to prevent an employee from asserting a claim under the anti-discrimination laws.

(footnote continued from preceeding page)
laws without regard to the FCN Treaties. The Second Circuit, which incorrectly determined that the American subsidiary of a Japanese company was afforded protection by the Japanese FCN Treaty, held that citizenship could be a bona fide occupational qualification pursuant to Title VII where the employment of a company's own nationals is reasonably necessary to the successful operation of the business. *Avagliano, supra* at 559. Thus, Article VIII(1) and Title VII can be read to involve no conflict. The Fifth Circuit in *Spiess v. C. Itoh & Co., Inc.*, 643 F.2d 333 (5th Cir. 1981), also improperly applied Article VIII(1) of the Japanese FCN Treaty to a domestic subsidiary of a Japanese company. Nevertheless, it held that Article VIII(1) fully insulated the company from domestic anti-discrimination laws. The *Spiess* Court ruled that the Japanese FCN Treaty provided a complete defense. The "absolute language of Article VIII(1) fully insulated the company from the domestic anti-discrimination laws with respect to the hiring of executives." (A-5). Thus, the Fifth Circuit is in complete conflict with the other circuit courts of appeals.

The foundation upon which the balanced approach of the Third Circuit was based was this Court's observation that the purpose of the FCN Treaties:

> . . . was not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis [with domestic companies] without suffering discrimination based on their alienage.

Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 187-188.

The Third Circuit recognized that the FCN Treaties were designed to promote the policy of equality and hospitality. "This means above all, assurance that the enterprise and property of the alien will be respected and that he will be accorded equal protection of the laws alike with the citizens of the [host] country." (A-13, quoting Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am.J.Comp.L. 229, 230 (1956)).[4] This perspective was refined by the understanding that the FCN Treaties were designed to restrict the host country from enacting laws requiring that foreign businesses hire employees from the local workforce. (A-16). The concern being addressed by the FCN Treaties was the imposition of percentile quotas. Consequently, the "of their choice" language is interpreted to allow the foreign company the same access to its own citizens as the host country's companies have to its citizens. (A-16). The Third Circuit read Article VIII(1) and its history to "indicate that the negotiators understood that employment decisions regarding personnel described in Article

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4. The District Court noted in its footnote 7 that this Court acknowledged Walker's status as Advisor on Commercial Treaties at the State Department and that the Department recognized him as being responsible for formulating the general structure of the postwar FCN Treaties,, *Sumitomo, supra*, 457 U.S. at 181, n.6. (A-14).

VIII(1) would be free of domestic laws utilizing citizenship as a criterion, but would be subject generally to other legally imposed criteria." (A-16).

Furthermore, the determination that Article VIII(1) of the Korean FCN Treaty does not result in unfettered decision making ability is supported by the second sentence of Article VIII(1) which permits the use of accountants and other technical experts without regard to whether they meet the professional qualifications established by the host country. The Third Circuit noted:

> If the first sentence had been intended to give a foreign employer the right to engage a citizen of its own country without regard to domestic laws that would otherwise impinge on that decision, the second sentence would have been unnecessary. Its presence suggests that the negotiators intended a foreign employer's decision to be unaffected by laws that discriminated on the basis of citizenship but nevertheless be subject to other domestic laws, excepting only those specifying professional qualifications.

(A-18).

Thus, the court concluded that the text of the Korean FCN Treaty and the negotiation histories of the FCN Treaties indicated that:

> . . . as far as American negotiators were concerned, in order to assure American investors of the right to hire qualified Americans in executive positions, and thus to overcome local legislation precluding that right, Article VIII(1) had to be drafted in absolute terms. Yet, that absolute language was intended to confer no greater right than an employer's freedom to choose the nationality of its executive labor pool.

(A-20). It was these considerations, the Third Circuit emphasized, that prompted this Court's observation in *Sumitomo* that the purpose of the Korean FCN Treaty language was not to give foreign corporations advantages over domestic enterprises, but rather to free them from "discrimination based on their alienage." (A-20, *citing, Sumitomo, supra*, 457 U.S. at 187-188). Therefore, Article VIII(1) of the Korean FCN Treaty protects the right of foreign employers' access to their own nationals just as domestic employers have access to their nationals. However, just as domestic corporations must abide by the anti-discrimination laws where intentional discrimination is involved, to be consistent with this Court's observation in *Sumitomo*, foreign corporations must also comply with such laws so as not to have an improper advantage over domestic corporations. It is for this reason that the Third Circuit properly concluded that MacNamara's disparate treatment claims could go forward. (A-23).

However, the court's analysis of the relationship between Article VIII(1) of the Korean FCN Treaty did not end at this point. The Third Circuit was concerned that allowing disparate impact proceedings would improperly intrude on protected Article VIII(1) employment decisions based on citizenship. In order to achieve a reconciliation of Article VIII(1) of the Korean FCN Treaty and the anti-discrimination laws, the Third Circuit would not allow MacNamara to proceed on a disparate impact theory.

The court concluded that since "empirical evidence can satisfy the subjective standard of liability" in disparate impact cases, companies "hailing from countries, including perhaps Korea, whose populations are largely homogenous" are at a substantial disadvantage in disparate impact cases. (A-18-A-19). This results from the fact that in a homogenous society the distinctions between race, national origin and citizenship become blurred, if they do not disappear completely. Thus, in the

case of a company from a homogenous society, the exercise of citizenship preference pursuant to Article VIII(1) rights might necessarily create a violation of Title VII's prohibition against race and national origin discrimination. (A-19). According to the Third Circuit, this result would lead to an impermissible conflict between the Korean FCN Treaty and Title VII. (A-25). In such an event, the Third Circuit determined that the Korean FCN Treaty would prevail. (A-21, *citing, McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963); *Spiess, supra* at 356.) Thus, MacNamara was not permitted to proceed on a disparate impact theory. The Third Circuit's approach removed any conflict between Article VIII(1) and the anti-discrimination laws and achieved an appropriate balance of MacNamara's rights as an employee and KAL's rights pursuant to the Korean FCN Treaty.[5]

KAL argued that *certiorari* should be granted because, *inter alia*, there is a conflict between the interpretation of the Korean FCN Treaty by the government of the United States and the government of the Republic of Korea. The Third Circuit, without discussion, found no conflict. (A-21, n. 13). This conclusion is correct. The Republic of Korea's analysis started with the assumption that there was a conflict between the Korean FCN Treaty and the anti-discrimination laws of the United States and did not address any reconciliation between the two. The United States government, on the other

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5. This is particularly true because the Third Circuit's requirement set forth in its footnote 15 that in a mixed motive case the plaintiff must demonstrate "but for" the discrimination the employment decision would have been different, is no longer the proper standard. (A-23). As a result of this Court's recent ruling, *Price Waterhouse v. Ann B. Hopkins*, U.S. , 57 U.S.L.W. 4469 (May 1, 1989), once the plaintiff has set forth a *prima facie* case establishing that improper motives played a significant role in the employment decision, the defendant then must demonstrate that "its legitimate reason, standing alone, would have induced it to make the same decision." *Hopkins, supra* at 4476.

hand, analyzed the Korean FCN Treaty and the anti-discrimination laws and determined that no conflict was presented where the discrimination was based on criteria other than citizenship. (A-20-A-21). Where citizenship as a criterion for discrimination was involved, both governments agreed that the Treaty would prevail. Because the Korean government did not address the reconciliation issue, the Third Circuit could properly determine that no conflict appeared in the record before it.

KAL raised the specter of the horrific economic consequences if foreign companies are required to comply with legally enacted anti-discrimination laws. The Third Circuit acknowledged this concern, but concluded that since domestic corporations are faced with the burden of defending personnel decisions and this "is a fact of business life in contemporary America," it was appropriate for their foreign competitors to face this issue as well. This was consistent with the Court's observation in *Sumitomo* that one should not be favored over another. 457 U.S. at 187-188. The court also recognized that although factfinders "can and do err from time to time," there was no reason to believe that this would occur more frequently in cases of this type. (A-23).

Under the foregoing circumstances, given the balanced approach taken by the Third Circuit, KAL has not articulated any persuasive reason for this Court to review the decision of the Third Circuit for the purpose of determining whether MacNamara's right to proceed against KAL pursuant to the anti-discrimination laws should be eliminated totally.

CONCLUSION

For the reasons set forth above, Thomas V. MacNamara respectfully requests that this Court deny Korean Air Lines' Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ROBERT D. GREENBAUM, hereby certify that three copies Respondent's Brief in Opposition To Petition For a Writ of Certiorari were served by first class mail, postage prepaid this 31st day of May, 1989 to the following:

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In the Supreme Court of the United States

OCTOBER TERM, 1989

Supreme Court, U.S.
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KOREAN AIR LINES, PETITIONER

v.

THOMAS V. MACNAMARA

THOMAS V. MACNAMARA, CROSS-PETITIONER

v.

KOREAN AIR LINES

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Article VIII(1) of the Treaty of Friendship, Commerce and Navigation between the United States and the Republic of Korea (8 U.S.T. 2223) provides that "companies of either Party shall be permitted to engage, within the territories of the other Party, * * * executive personnel * * * of their choice." The questions presented in this suit under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*) and the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 *et seq.*) are:

1. Whether Article VIII(1) gives a Korean company operating in the United States the right to select a Korean citizen for an executive position when that choice is based not on citizenship, but on race, national origin, or age.

2. Whether a Korean company is barred from exercising its Article VIII(1) right to select Korean citizens for executive positions in the United States because of their citizenship if that practice has a disparate impact on other individuals of a certain race, national origin, or age.

3. Whether a Korean company's Article VIII(1) right to "engage" executives of its choice encompasses the right to discharge a United States national in order to replace him with a Korean citizen.

4. Whether the court of appeals properly focused on the "executive" status of cross-petitioner's successor, rather than on cross-petitioner's own status, in deciding if Article VIII(1) protected the decision to discharge cross-petitioner in order to replace him with a Korean citizen.

5. Whether the district court abused its discretion in enforcing a discovery cut-off date.

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KOREAN AIR LINES, PETITIONER

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THOMAS V. MACNAMARA, CROSS-PETITIONER

v.

KOREAN AIR LINES

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner Korean Air Lines (KAL) is a Korean corporation with branch offices in the United States. In 1974, cross-petitioner Thomas MacNamara began working for KAL as a salesman. In 1977, he was promoted to district sales manager for Delaware, Pennsylvania, and southern New Jersey. In 1982, KAL reorganized its American operations. As part of that reorganization, KAL dismissed MacNamara, who was then 57 years old, and replaced him with a

Korean citizen who was 42 years old and who had entered the United States pursuant to an E-1 treaty trader visa.[1] After the reorganization, MacNamara's replacement served as district sales manager for the area extending from Pennsylvania to Florida. KAL also dismissed its other American managers and replaced them with Korean citizens. Pet. App. A3, A11-A12.[2]

2. Following his discharge, MacNamara sued KAL, alleging that his firing was based on race, national origin, and age, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* KAL moved to dismiss the complaint on the ground that its conduct was protected by Article VIII(1) of the Treaty of Friendship, Commerce and Navigation (FCN Treaty) of November 28, 1956, between the United States and the Republic of Korea, 8 U.S.T. 2223, T.I.A.S. No. 3947. The first sentence of Article VIII(1) of the FCN Treaty provides: "Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive per-

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[1] Under the Immigration and Nationality Act, a treaty trader is someone who enters the United States "solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national." 8 U.S.C. 1101(a)(15)(E)(i). To gain entry as a treaty trader, an alien must also show that he "will be engaged in duties of a supervisory or executive character, or, if he is or will be employed in a minor capacity, he has the specific qualifications that will make his services essential to the efficient operation of the employer's enterprise and will not be employed solely in an unskilled manual capacity." 22 C.F.R. 41.40(a) (1987).

[2] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 88-1449.

sonnel, attorneys, agents, and other specialists of their choice." 8 U.S.T. 2223.[3]

Treating KAL's motion to dismiss as one for summary judgment, the district court granted the motion (Pet. App. A27-A47). The court construed Article VIII(1) to give Korean companies "the right to select nationals who have Treaty Trader status as executive personnel without regard to American employment laws," and it concluded that KAL had validly exercised that right because it replaced MacNamara with a Korean national who held a treaty trader visa (Pet. App. A42). The district court rejected MacNamara's contention that although Article VIII(1) permits a Korean company to select Korean nationals for executive positions on the basis of their citizenship, it does not confer a right to make such selections because of race, national origin, or age. In its view, this interpretation would nullify the "of their choice" language of Article VIII(1) and impede a foreign company's ability to manage its investments in the host country. Pet. App. A42.

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[3] In *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176 (1982), the Court held that the identical provision of the FCN Treaty with Japan (Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863) did not protect the employment decisions of a company that was the subsidiary of a Japanese company but was incorporated in the United States. The Court concluded, in accordance with the position of the Executive Branch, that such a subsidiary is a company of the United States, not of Japan, within the meaning of the FCN Treaty. Because the Court found Article VIII(1) inapplicable, it had no occasion to consider the scope of the employment privileges accorded by that Article or their interaction with Title VII. See 457 U.S. at 189-190 n.19. In this case, it is undisputed that KAL is a company of Korea for purposes of Article VIII(1) of the FCN Treaty with Korea, and that KAL therefore is entitled to invoke whatever employment privileges are accorded by that Article.

3. The court of appeals reversed and remanded for further proceedings on MacNamara's claims of intentional discrimination (Pet. App. A1-A26). It held that the purpose of Article VIII(1) "is to assure foreign corporations that they may have their business in the host country managed by their own nationals if they so desire" (Pet. App. A9). It also held, however, that "Article VIII(1) was not intended to provide foreign businesses with shelter from any law applicable to personnel decisions other than those that would logically or pragmatically conflict with the right to select one's own nationals as managers *because of their citizenship*" (*ibid.*). The court of appeals therefore concluded that "[i]nsofar as Title VII and the ADEA proscribe intentional discrimination on the basis of race, national origin, and age," there is no "theoretical or practical conflict between them and the right conferred by Article VIII(1)" (*ibid.*). See *id.* at A13-A24. On the other hand, the court concluded that "to the extent that Title VII and the ADEA proscribe personnel decisions based on citizenship solely because of their disparate impact on older managers, a particular racial group, or persons whose ancestors are not from the foreign country involved," there is a "conflict" between Article VIII(1) and the antidiscrimination laws, and that conflict "must be resolved in favor of Article VIII (1)" (*id.* at A9). See *id.* at A24-A26.[4]

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[4] The court of appeals' holding regarding the interaction of Article VIII(1) and the antidiscrimination laws was in accordance with the position of the United States, which filed a brief as amicus curiae.

Like the district court (see Pet. App. A37-A42), the court of appeals rejected MacNamara's arguments that the FCN Treaty right is not implicated because he was not an "executive" within the meaning of Article VIII(1) and because a Korean company's right to "engage" executive personnel of

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or with any live precedent of another court of appeals. Moreover, this case is in an interlocutory posture, because the court of appeals has remanded the case to the district court to permit MacNamara to proceed with his claims of intentional discrimination. In the absence of a fully developed record and a final determination by the courts below on the merits of MacNamara's claims and their interaction with petitioner Korean Air Lines' FCN Treaty rights in this setting, it would be premature for the Court to consider KAL's assertions that the prohibitions in Title VII and the ADEA against intentional discrimination based on race, national origin, or age conflict with KAL's rights under Article VIII(1) of the FCN Treaty. The petition and cross-petition for a writ of certiorari therefore should be denied.

A. Korean Air Lines' Petition

1. KAL contends (Pet. 7-9) that Article VIII(1) gives it an absolute right to select any Korean national holding a treaty trader visa for an executive position, even if that choice is made on a ground prohibited by Title VII or the ADEA. The court of appeals correctly rejected that contention. Although Article VIII(1) gives Korean companies a right to fill executive positions in the United States with Korean citizens because of their Korean citizenship,

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its choice does not encompass the right to fire an existing employee (Pet. App. A9-A13). The court reasoned that MacNamara's replacement, who was a Korean national, served as an "executive" (even if MacNamara did not), and that the right to "engage" the replacement necessarily encompassed the incidental right to terminate MacNamara so that his duties could be assigned to the replacement (*ibid.*).

it does not sanction employment decisions that are based on race, sex, religion, age, or even national origin.[5]

a. The limited reach of Article VIII(1) is clear from its background. The FCN Treaty between the United States and Korea is one of a series of FCN treaties entered into by the United States after World War II. *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 181 n.6, 185 & n.13 (1982). All of the FCN treaties contain an employment privilege that is similar to Article VIII(1) of the FCN Treaty with Korea. The negotiators on behalf of the United States insisted upon those provisions for a specific reason. When the postwar FCN treaties were being negotiated, many countries had "percentile" restrictions that required United States companies operating abroad to hire a certain percentage of their workforce from the host country. As this Court has recognized, the employment provisions in the FCN treaties "were intended to avoid the effect of strict percentile limitations on the employment of Americans abroad and 'to prevent the imposition of ultranationalistic policies with respect to essential executive and technical personnel.'" *Sumitomo*, 457 U.S. at 181 n.6, quoting Walker, *Provisions on Companies in United States Commercial Treaties*, 50 Am. J. Int'l Law, 373 383 (1956). By overriding percentile laws, the FCN treaties were designed to enable United States companies to hire United States citizens for key positions abroad and to grant reciprocal rights to the companies of our treaty partners.

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[5] Nationality (or citizenship) does not mean the same thing as national origin. Nationality refers to the status of belonging to a country through birth or naturalization; national origin refers to the country from which a person or his ancestors came. See *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86 (1973).

The negotiating history of the FCN treaties confirms this purpose of the employment provisions, as this Court recognized in *Sumitomo*. There, the Court quoted diplomatic correspondence stating that the purpose of the parallel provision in the FCN Treaty with the Federal Republic of Germany was " 'to preclude the imposition of "percentile" legislation.' " See 457 U.S. at 181 n.6, quoting Foreign Service Despatch No. 2529 from Bonn, at 1 (Mar. 18, 1954) (C.A. Supp. App. 21).[6] By contrast, there is nothing in the negotiating histories of the FCN treaties to suggest that the employment provisions were designed to excuse a foreign company from complying with those nondiscrimination requirements of domestic law that do not prohibit it from engaging its own nationals to fill key positions.

Indeed, the purpose of the employment provisions is directly expressed in the FCN Treaty with Uruguay, which served as the model for most subsequent FCN treaties. That Treaty conferred a right to hire key personnel "regardless of nationality." Treaty of Friendship, Commerce and Economic Development, Nov. 23, 1949, United States-Uruguay, art. V(4) *reprinted in* 96 Cong. Rec. 12,083 (1950). This language clearly conveys the understanding that foreign companies would be free to select executives and other essential personnel on the basis of their nationality, but does not imply a sweeping immunity from

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[6] See also Foreign Service Despatch No. 144 from The Hague, at 4 (Aug. 16, 1954) (C.A. Supp. App. 32) ("the big problem to which the sentence * * * was addressed was so-called percentile legislation"); Foreign Service Despatch No. 914 from Brussels, at 5 (Mar. 11, 1955) ("the abuse the sentence was designed to correct [was] 'percentile' laws and other governmental fiats circumscribing freedom of choice of high-grade personnel on a purely nationality basis") (C.A. Supp. App. 39).

all domestic employment laws. Although some subsequent treaties that were modeled on the Uruguayan Treaty retained the "regardless of nationality" language, most did not. This difference in language was not intended to effect a change in meaning; rather, the phrase "of their choice" in the Korean and other FCN treaties (quoted at pages 2-3, *supra*), is simply shorthand for "of their choice, regardless of nationality." See *Commercial Treaties: Hearing Before the Subcomm. of the Senate Comm. on Foreign Relations*, 83d Cong., 1st Sess. 9 (1953) (describing four treaties, including three with the shortened "of their choice" language, as containing a "[r]ight to engage technical and managerial personnel regardless of nationality.").

The second sentence of Article VIII(1) of the FCN Treaty also shows that foreign companies were to remain subject to domestic laws that do not interfere with the right to hire on the basis of nationality. The second sentence gives foreign companies the right to employ accountants and other experts who have not satisfied the professional standards of the host country, but only for particular purposes.[7] The clear implication is that companies normally must hire only those professionals who *do* have the qualifications required by the host country—a principle that is at odds with petitioner's notion that the first sentence of

[7] The second sentence of Article VIII(1) provides (8 U.S.T. 2223 (emphasis added)):

> Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they have qualified for the practice of a profession within the territories of such other Party, *for the particular purpose* of making examinations, audits and technical investigations for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises * * *.

Article VIII(1) grants a right of choice that is unfettered by domestic law.

Finally, the construction given Article VIII(1) by the court below is consistent with the broader object of the FCN treaties generally. As this Court explained in *Sumitomo*, "[t]he purpose of the [FCN] Treaties was not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage." 457 U.S. at 187-188. That purpose is expressed most directly in Article VII of the FCN Treaty with Korea, which gives foreign companies "national treatment with respect to engaging in all types of commercial, industrial, financial and other activities," including the right "to control and manage enterprises which they have established or acquired." 8 U.S.T. 2222. Under a regime of "national treatment," a foreign company is entitled to the same rights and is subject to the same responsibilities as a domestic company. *Sumitomo*, 457 U.S. at 188.

The employment privilege in Article VIII(1) is a "corollary" to this general principle of national treatment. Foreign Service Despatch No. 2529, *supra*, at 1 (C.A. Supp. App. 21). To be sure, the employment privilege is not written in "national treatment" terms, but that is only because it was necessary in this instance to go beyond strict national treatment in order to guarantee equality in the relevant sense. While percentile laws and other restrictions on the hiring of aliens applied to domestic and foreign employers alike, they had a far more severe impact on foreign employers, who were prevented from hiring their own nationals. Article VIII(1) therefore relieves foreign employers from the effect of such laws, even if local employers remain subject to them. In

this way, Article VIII(1) gives foreign employers the same access to their citizens for executive positions as local companies have to their citizens, and thereby establishes a basis for competitive equality.

Unlike percentile restrictions, the provisions of Title VII and the ADEA that prohibit discrimination on grounds other than citizenship do not place foreign companies at a competitive disadvantage; instead, they have precisely the same effect on foreign companies as on domestic companies. Accordingly, it would be inconsistent with the basic national-treatment framework of the FCN Treaty to rely on Article VIII(1) as a basis for implying an exemption from Title VII and the ADEA for the selection of key personnel by foreign companies. Just as local companies may not select employees on grounds such as race, national origin, and age, foreign companies may not do so.

b. For the foregoing reasons, the Department of State has interpreted the employment privileges in FCN treaties as providing no defense to claims of intentional discrimination based on race, sex, religion, national origin, or age. The Third Circuit properly gave "'great weight'" to this interpretation (Pet. App. A20-A21, quoting *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961)), just as this Court gave great weight to the Executive Branch's construction of the employment provisions of the Japanese FCN Treaty in *Sumitomo*, 457 U.S. at 184-185. See also *Societe Nationale Industrielle Aerospatiale* v. *United States District Court*, 482 U.S. 522, 535-536 & n.17 (1987).

KAL asserts (Pet. 9) that the State Department's interpretation of Article VIII(1) conflicts with that of the Korean Government. The court of appeals, however, correctly "perceive[d] no conflict between the position of the United States government and that

of the Korean government" (Pet. App. A21 n.13). Significantly, KAL offers no support for its assertion that the Korean Government has taken a conflicting position. The only expressions of views by the Republic of Korea that are in the record in this case were set forth in two opinions issued by its Ministry of Foreign Affairs on October 25, 1984, which are discussed in an affidavit of the Counsellor to the Embassy of the Republic of Korea in Washington. See C.A. App. 779-780. In the first opinion, the Ministry of Foreign Affairs stated that the FCN Treaty would prevail over the domestic law of Korea *if* there were a conflict; in the second opinion, the Ministry took the position that the right of foreign companies to "engage" employees of their choice includes the right to terminate existing employees. *Ibid.* In neither opinion did the Ministry of Foreign Affairs express any view on the precise scope of the treaty right. In particular, it did not express a view on whether the Treaty gives a Korean company a right to choose a Korean national for an executive position when that choice is made on the basis of race, national origin, or age, rather than Korean citizenship. Nor are we aware of any other occasion on which the Republic of Korea expressed a view on that question. KAL therefore fails in its attempt to discredit the State Department's interpretation of Article VIII(1) by asserting that the Korean Government has adopted a contrary position.

c. KAL argues (Pet. 8) that its interpretation of Article VIII(1) is superior to that adopted by the Third Circuit because the former is consistent with the literal meaning of the "of their choice" language in Article VIII(1). For this reason, KAL further argues, the decision below disregards this Court's admonition in *Sumitomo* that the plain meaning of the FCN Treaty language should control in the absence

of substantial reasons to the contrary. See Pet. 8, citing 457 U.S. at 189. The issue here, however, is quite different from that in *Sumitomo*. There, the definitional provision of the FCN Treaty with Japan supplied an explicit answer to the question whether a subsidiary incorporated under the laws of the United States was to be regarded as a company of Japan. See 457 U.S. at 182. And it was that definitional provision to which the Court referred in *Sumitomo* in stating that the "literal language" of the FCN Treaty barred the subsidiary from invoking the protection of the employment provision. See *id.* at 183. Here, by contrast, neither Article VIII(1) nor the definitional provision of the FCN Treaty with Korea supplies a definition or further elaboration of the critical language "of their choice" in Article VIII(1).

Nor does the phrase "of their choice," in itself, have any one plain meaning. For example, the broadest (and perhaps most literal) construction of Article VIII(1) would give KAL the right to make an unfettered "choice" of executive personnel from among *American* applicants on grounds prohibited by Title VII and the ADEA—*e.g.*, it could select a white American over a black American, solely on the basis of race. KAL has recognized that such an interpretation is untenable, and it therefore has argued that Article VIII(1) affords it an absolute right of choice only when it selects a Korean national who holds a treaty trader visa. But this suggested limitation does not appear in the language of Article VIII(1), and it therefore serves to highlight that a proper construction of Article VIII(1) cannot depend on an effort to identify the supposedly literal or plain meaning of the phrase "of their choice," standing alone.[8]

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[8] KAL's argument that the literal language of the first sentence of Article VIII(1) gives it an absolute right of choice, unfettered by any restraints imposed by domestic law, is also

In these circumstances, it is most sensible to construe the phrase "of their choice" by reference to those restrictions on an employer's freedom of choice that the treaty Parties sought to eliminate. As we have shown, the Third Circuit's construction is based on that analysis, because it recognizes the right of a foreign company to select its own nationals on the basis of their *citizenship*, so that it can manage its investments and operations in the United States through personnel in whom it has the most confidence. By contrast, there is nothing in the text, structure, or background of the FCN treaties suggesting an intent to confer an affirmative right on a foreign company to make a "choice" that is not based on such legitimate business concerns, but instead is based on such otherwise prohibited and extraneous factors as race, sex, national origin, or age. Thus, the interpretation adopted by the Third Circuit gives effect to the central purpose of Article VIII(1), while at the same time avoiding an expansive interpretation that would unnecessarily bring that Article into conflict with intervening legislation that embodies the profound national commitment to eliminating discrimination. Compare *Bryan* v. *Itasca County*, 426 U.S. 373, 386-387 (1976).[9]

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inconsistent with the language of the second sentence of that Article. The second sentence plainly contemplates that a foreign company may engage only those professional personnel who possess the qualifications required by domestic law, except in certain limited circumstances. See pages 8-9 & note 7, *supra*.

[9] In any event, this Court made clear in *Sumitomo* that even where the language of a treaty is clear, it does not control when it produces a result that is demonstrably inconsistent with the intent of the parties and the construction given the treaty by responsible Executive Branch personnel. 457 U.S. at 185. That would be the result of KAL's interpretation here.

d. KAL contends (Pet. 9) that the ruling below will discourage foreign investment in the United States because foreign companies cannot choose their executives with complete assurance that their decisions will not be challenged in court. But under the Third Circuit's decision, if a foreign company hires its executives on the basis of their citizenship, it will have a complete defense to a suit under Title VII and the ADEA. Given this important protection, there is no reason to believe that the ruling below will substantially deter foreign investment. It is significant in this regard that the Third Circuit's decision in this case is not a novel development; it is consistent with the position of the Executive Branch and with the general thrust of other court of appeals' decisions. See pages 16-17, *infra*. Yet despite this general consensus in recent years, we are not aware of any indication that foreign investment has been deterred as a result of this construction of the FCN treaties and their interaction with domestic antidiscrimination laws; indeed, we have been informed by the Department of State that it has not received any representations by foreign governments to that effect.

KAL's fear that American courts will not honor the FCN Treaty defense because of prejudice against foreign companies is simply unfounded. As the court of appeals concluded, while "factfinders can and do err from time to time," there is no reason to think that the plaintiff in this case is "more likely to succeed than any other employment discrimination plaintiff in convincing the trier of fact that the decision was made for some different, impermissible reason" (Pet. App. A22-A23).

2. KAL argues (Pet. 7-8) that the Court should grant certiorari to resolve a conflict between the Third Circuit's decision in this case and the decisions of the Second, Fifth and Sixth Circuits in *Avigliano*

v. *Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2d Cir. 1981), vacated on other grounds, 457 U.S. 176 (1982); *Spiess* v. *C. Itoh & Co.*, 643 F.2d 353 (5th Cir. 1981), vacated on other grounds, 457 U.S. 1128 (1982); and *Wickes* v. *Olympic Airways*, 745 F.2d 363 (6th Cir. 1984). Contrary to KAL's contention, however, there is no live conflict warranting review by this Court.

Only one of the three appellate decisions upon which KAL relies has any current precedential force—the Sixth Circuit's ruling in *Wickes*. However, the Sixth Circuit there adopted precisely the same construction of the parallel employment privilege in the FCN Treaty with Greece as the Third Circuit adopted here. *Wickes*, 745 F.2d at 367-369. In *Sumitomo* and *Spiess*, the Second and Fifth Circuits first held that companies incorporated in the United States but controlled by foreign corporations were entitled to the protection of the employment privilege under the FCN Treaty with Japan; it was on that predicate that the Second and Fifth Circuits then construed the scope of the privilege. This Court subsequently held in *Sumitomo* that a subsidiary of a foreign company that is incorporated under the laws of the United States is a company of the United States, not of the foreign country, and that the subsidiary therefore cannot claim the protection of the employment privilege in the Treaty. The Court therefore vacated the lower court judgments in both *Sumitomo* and *Spiess*. Accordingly, the rulings by the Second and Fifth Circuits regarding the scope of the employment privilege have no current precedential effect (*O'Connor* v. *Donaldson*, 422 U.S. 563, 577-578 n.12 (1975)), and do not give rise to a live conflict with the decision below and *Wickes*.

Moreover, it is unclear to what extent the now-vacated rulings in *Sumitomo* and *Spiess* departed, at

least as a practical matter, from the view adopted by the Third and Sixth Circuits in this case and *Wickes*. The opinions in both cases agreed that the purpose of the employment privilege was to overcome percentile legislation and to afford foreign companies the right to hire their own nationals for executive positions. *Sumitomo*, 638 F.2d at 559; *Spiess*, 643 F.2d at 359-363. In addition, although the precise holdings by the Second and Fifth Circuits are subject to varying interpretations, their focus was different from that of the court below and the Sixth Circuit in *Wickes*. *Sumitomo* and *Spiess* principally involved the question whether the FCN Treaty with Japan gives a foreign company an absolute right to select executives on the basis of nationality. The Fifth Circuit concluded that the Treaty does confer such a right (*Spiess*, 643 F.2d at 362), while the Second Circuit concluded that the foreign company must justify such a preference as a bona fide occupational qualification (*Sumitomo*, 638 F.2d at 558-559). Neither *Sumitomo* nor *Spiess* expressly addressed the distinct question presented by KAL here: whether the FCN Treaty confers a right to select a foreign national on grounds *other* than nationality, such as race, national origin or age.[10]

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[10] The Fifth Circuit in *Spiess* expressly held only that the treaty provision served to exempt a company of Japan from domestic discrimination laws "to the extent of permitting discrimination in favor of Japanese citizens in employment for executive and technical positions" (643 F.2d at 359; see also *id.* at 362 & n.8).

The Second Circuit's approach in *Sumitomo* would have imposed a burden on a foreign company in excess of that imposed by the Third Circuit in this case, because it would have required the company to offer a special justification even for the selection of an employee based on his Japanese citizenship. See Pet. App. A22 n.14. Because KAL therefore is not aggrieved by the Third Circuit's failure to adopt the

In any event, the Second and Fifth Circuits addressed the scope of the employment privilege in the FCN treaties in a considerably different posture than did the court below and the Sixth Circuit in *Wickes*. The Second and Fifth Circuits did not have the benefit of this Court's opinion in *Sumitomo*, which considered the background and purposes of the FCN treaties; they did not have before them much of the negotiating history of the employment provisions; and they did not have the benefit of the fully developed views of the Department of State, which are entitled to considerable weight in construing the relevant treaty provisions. Should the issue again come before the Second and Fifth Circuits, they will be entirely free to reexamine the views expressed in their now-vacated decisions in *Sumitomo* and *Spiess* in light of these important intervening events and sources of guidance. It is quite possible that such a reexamination would lead them to reach the same conclusion as the Third and Sixth Circuits in this case and *Wickes*. If they do not do so, there will be time enough for this Court to consider the issue.

B. MacNamara's Cross-Petition

1. MacNamara urges (Cross-Pet. 7-10) the Court to grant review of the holding below that Article VIII(1) precludes a challenge to a foreign company's citizenship preference on the ground that it has a disparate impact on the basis of national origin. Review is not warranted, however, because this was an issue of first impression in the courts of appeals and because the resolution of it by the court below was clearly correct. As we have explained, the right of a

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Second Circuit's approach, this would not be an appropriate vehicle for resolving any conflict between the decision below and the Second Circuit's decision in *Sumitomo* even if the latter had not been vacated by this Court.

foreign company to prefer its own citizens for executive positions is precisely what the FCN Treaty protects. Accordingly, as the court of appeals concluded (Pet. App. A24-A25), MacNamara's disparate impact claim seeks to impose liability on KAL for doing nothing more than exercising its treaty right.

MacNamara relies (Cross-Pet. 8) on the proposition that the treaty right was designed only to eliminate the effect of percentile restrictions and other ultra-nationalistic laws, which he seeks to distinguish from the limitations imposed by the disparate-impact reach of the antidiscrimination laws of the United States. But the vice of percentile laws was that they interfered with a foreign company's freedom to select citizens of its own country to fill executive and other key positions. MacNamara's disparate-impact theory of liability would have the same effect.

MacNamara correctly points out (Cross-Pet. 8-9) that the legislative history of the Senate's ratification of the FCN treaties indicates that they were not intended to interfere with state antidiscrimination laws or to permit racial discrimination against American citizens. However, when the Senate was considering the treaties, the concept of "discrimination" was generally understood to mean dissimilar treatment. There was no established theory of disparate-impact discrimination, much less any case law suggesting that a foreign company's citizenship preference could be successfully attacked under such a theory. Thus, although the legislative history cited by MacNamara reinforces the court of appeals' conclusion that the treaty privilege does not sanction purposeful discrimination on grounds prohibited by Title VII, it does not support MacNamara's argument that he should be permitted to challenge KAL's use of a citizenship preference on disparate-impact grounds.

Relying on *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888), MacNamara argues (Cross-Pet. 10) that any conflict between the treaty privilege on the one hand and Title VII and the ADEA on the other should be resolved in favor of the latter, since they were enacted more recently. But this last-in-time rule applies only when Congress has clearly expressed its affirmative intent to override a prior treaty. See *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963). As the court of appeals concluded (Pet. App. A21), Congress did not express any such affirmative intent when it enacted Title VII or the ADEA. In any event, there is no conflict between the treaty right and Title VII (or the ADEA). Article VIII(1) reflects a categorical determination, having legislative effect, that foreign companies have a substantial business justification for hiring executive personnel on the basis of nationality. Such a practice is therefore both protected by the Treaty and consistent with federal antidiscrimination law. See *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115, 2125-2126 (1989) (employment practice that has a disparate impact, but which significantly serves an employer's legitimate business goals, does not violate Title VII).

2. The remaining issues raised by MacNamara also are ones of first impression that clearly do not warrant review. MacNamara's claim (Cross-Pet. 10-11) that KAL's right to "engage" a Korean citizen does not encompass the right to fire an American national to make way for the Korean replacement is without merit. "[A]s a matter of statutory interpretation, * * * absent a 'specific provision to the contrary, the power of removal from office is incident to the power of appointment.'" *Carlucci* v. *Doe*, 109

S.Ct. 407, 411 (1988). Furthermore, as the court of appeals observed, "[a] contrary reading of Article VIII(1) would tend to freeze a foreign business' initial management structure and discourage any experimentation with host country executive personnel" (Pet. App. A11). Like the court of appeals, "[w]e are confident that the drafters of the Treaty did not intend such a result" (*ibid.*).

The question whether the court of appeals properly focused on the "executive" status of MacNamara's Korean successor, rather than on MacNamara's own status (see Cross-Pet. 11), can arise only in those rare instances in which the job responsibilities of a replacement are so different from those of his predecessor that one is properly classified as an executive, while the other is not. It therefore is not of sufficient importance to warrant review. Moreover, the court of appeals reasonably focused on the "executive" status of MacNamara's replacement, since the employment privilege protects the foreign company's choice to "engage" citizens of its own country to protect its business interests. A foreign company's freedom to do so should not depend on whether the foreign national will fill an existing position with established duties or instead will occupy a newly created position having some duties that previously were performed by an employee of a lower rank.[11]

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[11] We take no position on the merits of the remaining question presented by MacNamara (Cross-Pet. 11-12): whether the district court abused its discretion in enforcing a discovery cut-off date. But that fact-bound issue does not in any event satisfy this Court's usual standards for review.

CONCLUSION

The petition and cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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